

ORIGINAL (2)  
7/31IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROTH, Calvin William Jr.	:	NO. CIVIL NO. 1:
Petitioner	:	CV-00-1831
	:	
	:	(Judge Rambo)
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, Et. Al.	:	
Respondents	:	

FILED  
HARRISBURG, PA  
JUL 30 2001  
MARY E. D'ANDREA, CLERK  
Per \_\_\_\_\_ Clerk

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

And now, to wit, this \_\_\_\_ day of July, 2001, I, Thomas H. Kelley, First Assistant District Attorney, York County District Attorney's Office, hereby file the following response to the Petition for Writ of Habeas Corpus pursuant to Order of Court dated October 16, 2000 and allege the following:

1. On July 21, 1993, the Petitioner, Calvin W. Roth, following a jury trial, was convicted of Rape, Terroristic threats and Escape, before the Honorable John H. Chronister, York County Court of Common Pleas. (Appendix A) The Petitioner was sentenced on September 2, 1993 to an aggregate term of eleven (11) to twenty-two (22) years incarceration. (Appendix D)
2. On July 27, 1993, the petitioner filed a Motion for New Trial alleging that the victim's emotional testimony prejudiced the jury. (Appendix B) On August 19, 1993, a hearing was held to review the Motion for Mistrial. Upon conclusion of the hearing, the Honorable John H. Chronister refused the motion for mistrial stating that the trial

court was acting within its discretion when deciding not to allow the mistrial. (Appendix C)

3. On September 2, 1993, Sentencing proceedings were held before the Honorable John H. Chronister. (Appendix D)
4. On September 10, 1993, the Petitioner then filed a request for a reconsideration of sentence. (Appendix E) By order of the Court of Common Pleas, dated September 30, 1993, the Motion was refused and dismissed. (Appendix F)
5. On October 4, 1993, the Petitioner filed a pro se "Motion for Judgment of Acquittal Not Withstanding the Verdict of a New Trial" in the Superior Court of Pennsylvania; this motion was considered the petitioner's first request for relief under the PCRA. (Appendix G) In the motion, the petitioner alleged ineffective assistance of counsel and requested that new counsel be appointed. The Superior Court granted the petitioner's request on December 1, 1993, the Court of Common Pleas appointed Frank Arcuri, Esq. to represent the Petitioner. (Appendix J)
6. The Court of Common Pleas, attempting to commence a hearing to review the Petitioner's Post Conviction Relief Act Petition, was forced to postpone the proceeding twice (February 16, 1994 & June 16, 1994) due to the petitioner's unavailability. (Appendix K & L)
7. On December 14, 1995, the Superior Court of Pennsylvania issued an order affirming the trial

court's Judgment of Sentence dated September 2, 1993. (Appendix M)

8. The Court of Common Pleas was finally able to hold a Post Conviction Relief Act Hearing January 30, 1996. In its decision, the Court concluded that the Petitioner's counsel was not ineffective and denied the requested relief. (Appendix N)
9. The Petitioner then filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. This appeal was in response to the Superior Court's affirmation of the judgement of sentence. Said appeal was denied in a Per Curiam decision on May 30, 1997. (Appendix O)
10. On November 1, 1997, Petitioner filed a Petition for Writ of Habeas Corpus with the United States District Court for the Middle District of Pennsylvania. (Appendix P) The Honorable Judge Sylvia A. Rambo dismissed the petition on July 17, 1998. (Appendix Q) In the Court's Opinion, Judge Rambo indicated that the issue of the jury's constitutionality raised by the Petitioner had not been previously presented and therefore was not exhausted at the state level. Moreover, the Court stated that habeas corpus petitions containing unexhausted claims are dismissed so that the petitioner can exhaust his state remedies and pursue another appeal. People v. Fulcomer, 882 F.2d 828, 832 (3d Cir. 1989).
11. On December 7, 1998, Petitioner filed a second Post Conviction Relief Act petition. (Appendix R) On December 9, 1998, the Honorable John H.

Chronister dismissed the petition as untimely.

(Appendix S) In Commonwealth v. Hutchins, 760 A.2d 50(2000), the Superior Court concluded that a trial court has no jurisdiction to entertain an untimely petition for Relief under the Post Conviction Relief Act.

12. On February 18, 1999, Petitioner filed a pro se Motion to Vacate Judgement or Set Aside Sentence - the lower Court considered this motion as a third PCRA petition. (Appendix T) In the Motion, the Petitioner alleged ineffective assistance of counsel, prejudicial testimony and the unconstitutionality of his empanelled jury. On March 2, 1999, this PCRA petition was denied by the Court of Common Pleas on the basis that the issues raised were either raised in direct appeal or previous Post Conviction Relief Act Petitions or were waived because of the failure to raise them in the previous Post Conviction Relief Act. (Appendix U)

13. Thereafter, the Superior Court of Pennsylvania affirmed the decision by the Court of Common Pleas on February 8, 2000; however, the Superior Court specifically stated that the petition was untimely for failure to be filed within one year of the judgment of sentence. (Appendix V)

14. On March 6, 2000, the Petitioner filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania. On July 25, 2000, the Supreme Court entered a Per Curiam decision denying the Petition for Allowance of Appeal and affirming the orders of

the Court of Common Pleas and the Pennsylvania Superior Court. (Appendix W)

15. On October 16, 2000, the Petitioner filed a second Petition for Habeas Corpus. The Petition claimed:

- a) Counsel was ineffective for failing to contest the credibility of certain jurors and allowing the jury to consist of ten (10) woman and two (2) men and therefore he was denied a jury of his peers;
- b) that counsel was ineffective for failing to honor the Petitioner's wishes and failing to communicate how the trial was being handled and failing to provide for an in-Camera hearing;
- c) that trial counsel was ineffective for failing to secure certain witnesses; and
- d) that the Petitioner's trial was prejudiced by testimony made by Commonwealth witnesses which was contradicted by police reports and testimony given at the preliminary hearing.

### Argument

Absent a showing of cause and prejudice, federal habeas corpus review is denied if the issue presented is barred by a state procedural default<sup>1</sup>. Wainwright v. Sykes 433 U.S. 72, 53 L.Ed.2d 594 (1977). The Supreme Court's decision is based on the

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<sup>1</sup> The Supreme Court in Wainwright v. Sykes limits its application of the rule to the untimely objection to the admission of a confession; however, dicta indicates that the principle should be applied more broadly to state procedural bars. 433 U.S. 72, 53 L.Ed.2d 594

concern the Court has in regard to the passage of time, erosion of memory and dispersion of witnesses that would affect a retrial. Engle v. Isaac 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982); Wainwright 433 U.S. 72 (1977). But the primary concern is that by failing to abide by state procedural guidelines, a Petitioner has denied the state courts an opportunity to address the claims in the first instance. Peterkin v. Horn 34 F.Supp2d 289 (E.D. Pa 1998)

Within the Commonwealth of Pennsylvania, the Pennsylvania Post Conviction Relief Act 42 Pa.C.S. § 9541, et. Seq. (PCRA) "provides for an action by which persons convicted of crimes that they did not commit and persons serving illegal sentences may obtain collateral relief." 42 Pa.C.S. § 9542. Breach of the filing requirements of the Post Conviction Relief Act establishes a procedural bar to Federal review. Harris v. Reed 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989). Commonwealth v. Peterkin, \_\_\_ Pa. \_\_\_, 722 A.2d 638, 641 (1998).

On November 17, 1995, the Post Conviction Relief Act was amended (effective in 60 days), and 42 Pa.C.S.A. § 9545(b)(1) now provides:

**(b) Time for filing petition**

- (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania

after the time period provided in this section and has been held by that court to apply retroactively.

Originally, the Petitioner filed a direct appeal from his judgement of sentence, and the Superior Court affirmed the Lower Court on December 14, 1995. (Appendix M) Petitioner did not file a Petition for Allowance of Appeal to the Pennsylvania Supreme Court. Thus, Petitioner's judgment of sentence became final on January 13, 1996, upon expiration of the thirty-day period for filing a Petition for Allowance of Appeal. 42 Pa.C.S.A. § 9545(b)(3); Pa.R.C.P. 1113.

On February 18, 1999, the Petitioner filed a Motion to Set Aside Sentence that was considered his third petition for relief under the PCRA. (Appendix T)

Evaluating the petition, the Superior court found that because of the filing date of Petitioner's PCRA petition, sub judice, the PCRA, as amended on November 17, 1995 (effective in 60 days), applied. (Appendix V, pg. 4) The Superior court held that the Petitioner's third petition was untimely because it was filed well in excess of one year after his judgement of sentence became final on January 13, 1996. (Appendix V, pg. 4) The Court also held that the Petitioner's allegations did not fall within the exceptions to 42 Pa.C.S.A. § 9545 (b)(3). (Appendix V, pg. 5)

The issues first raised by the Petitioner in his second and third petitions are thus precluded from review by this Honorable Court. This is validated by the Superior Court's Order dated February 8, 2000, as the last state court rendering judgment on the petition, stating that the petition was denied for being untimely under 42 Pa.C.S.A. § 9545(b)(3). (Appendix W) The issues that are precluded from this Honorable Court's review are: (1) the jury was unconstitutionally selected and empanelled, and (2) Petitioner was denied effective assistance of counsel because counsel failed to honor the Petitioner's wishes or communicate how the trial should be handled.

The remaining issues presented under the current petition requesting federal habeas corpus review are: (1) Counsel was ineffective for failing to secure witnesses, and (2) Counsel was ineffective for allowing the Petitioner to be prejudiced by tainted and contradictory testimony. The Petitioner also incorporates a third issue, the prejudicial effect of the emotional outburst of the victim. These issues were implicated in the Petitioner's original application under the Post Conviction Relief Act and the first habeas corpus petition. (Appendix G, Appendix P)

First, the Commonwealth concedes that the Petitioner has appropriately preserved the third claim for relief for review and exhausted the issue within the Pennsylvania State Courts (Appendix G, Appendix N, Appendix O); however, the Respondent argues that the claim is meritless. Because the Petitioner fails to identify the witnesses in the current petition, Respondent is forced to conclude that the witnesses in question are the three (3) considered in the initial Post Conviction Relief proceeding. (Appendix N)

On January 30, 1996, the Court of Common Pleas held a proceeding to review the Petitioner's first PCRA petition. (Appendix N) The Honorable Judge Chronister concluded that Petitioner's counsel did in fact take appropriate measures in regard to each of the three (3) witnesses. Mr. Gladstone, one of the witnesses, was contacted, subpoenaed and testified at trial. (Appendix N, pg. 67; Appendix A, pg. 87) As the Court's opinion indicates, Petitioner's counsel did everything possible in obtaining testimony from this witness.

Petitioner's counsel also contacted the second witness, Ms. McPartland. Ms. McPartland provided a written letter to Mr. McVeigh (Petitioner's defense counsel) stating that she had no personal knowledge of the events which occurred specifically; furthermore, she did not want to participate in the trial.



(Appendix N, pg. 67) As a result, Mr. McVeigh made a strategic decision not to call her as a witness.

Finally, Mr. McVeigh did issue a subpoena for the third witness; however, the subpoena was issued in New York State and not properly served. The Honorable John H. Chronister concluded that Mr. McVeigh's decision to release the witness from the subpoena was "of no significance." (Appendix N, pg. 67)

The Petitioner's allegation that counsel was ineffective for failing to secure three witnesses is therefore faulty based on the facts established at the post conviction relief hearing. At the Petitioner's Post Conviction Relief Act hearing, the Honorable John H. Chronister stated that the Petitioner's "counsel was not ineffective in failing to have the three witnesses present." (Appendix N, pg. 70) The claim is meritless and should be dismissed.

Second, the Commonwealth argues that Petitioner has presented an entirely new issue under the fourth claim for relief, which renders the claim inappropriate for review. In his initial PCRA petition, the Petitioner alleged that there were "various inconsistencies in the testimony of the alleged victim." (Appendix G) In contrast, the Petitioner's habeas petition implies that "Commonwealth witnesses" provided the contradicted testimony and was a result of ineffective assistance of counsel. Under 42 Pa.C.S.A. § 9544(b), an issue is deemed waived if the petitioner failed to raise it at trial, on appeal, or in a prior post conviction proceeding. Commonwealth v. Appel, 547 Pa. 171, 689 A.2d 891 (1997). By failing to previously implicate other individuals and his counsel in this allegation, the Petitioner has waived his ability to contest any testimony other than that of the alleged victim<sup>2</sup>.

The Petitioner's final allegation states that his counsel was ineffective for failing to object to the emotional outburst

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<sup>2</sup> A Petitioner cannot obtain post conviction review of claims previously litigated on appeal by alleging ineffective assistance of prior counsel and presenting new theories of relief to support previously litigated claims. Commonwealth v. Peterkin 649 A.2d 121; 538 Pa 455 (1994).

of the witness. The Commonwealth concedes that this issue is ripe for review, but contends that it is meritless due to the facts of the case. The transcript from the trial proceedings indicates that the Petitioner's counsel did object to the outburst at trial by requesting a mistrial. (Appendix A, pg. 31). Furthermore, Petitioner's counsel filed a Motion for New Trial stating the outburst as cause. (Appendix B) Counsel having objected to the witness's outburst, preserving the issue and arguing it on appeal, acted reasonably. The claim of ineffective assistance of counsel is therefore meritless and should be dismissed.

Assuming *arguendo* that this Honorable Court decides to exercise its discretion to evaluate the Petitioner's first claim for relief (whether the jury was unconstitutionally selected and empanelled), the Commonwealth argues that this Honorable Court is still precluded from reviewing the issue because of the Petitioner's failure to appropriately challenge the jury. A state procedural bar should apply even where the error affects the truth-finding function of the state trial. Engle v. Isaac 456 U.S. 107, 129, 102 S.Ct. 1558, 1572, 71 L.Ed.2d 783 (1982). Under the laws of the Commonwealth of Pennsylvania, a Petitioner's jury challenge must be presented within a specific time period and state an appropriate challenge.<sup>3</sup> 42 Pa.R.Cr.P. 630. Rule 630 states:

**(B) Challenge to the Array.**

- (1) Unless opportunity did not exist prior thereto, a challenge to the array shall be made not later than 5 days before the first day of the week the case is listed for trial of criminal cases for which the jurors have been summoned and not thereafter, and shall be in writing,

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<sup>3</sup> Nerison v. Solem 715 F.2d 415 (1983) (The court in concluded that the Petitioner's request for a new trial was prejudicially denied because he did not request a new judge in a timely fashion.); Wayne v. White 735 F.2d 324 (1984) (The Court dismissed the petition concluding that the Petitioner failed to previously raise the issue or show good cause as to why he did not.)

specifying the facts constituting the ground for the challenge.

- (2) A challenge to the array may be made only on the ground that the jurors were not selected, drawn, or summoned substantially in accordance with law. 42 Pa.R.Cr.P. 630

A failure to timely challenge one's jury composition is a waiver for future objections. Commonwealth v. Jackson 486 A.2d 431, 436 (1984). The Petitioner's objection to the jury composition is untimely and was waived because he failed to raise such argument until his second petition for Post Conviction Relief was filed on December 12, 1998. (This petition was filed after the Petitioner's initial application for habeas review was denied, precluding the State Court from ruling on or waiving the issue in the course of the previous Post Conviction Relief petition.) Because the trial was held in July of 1993, the Petitioner was well past the procedural five-day period specified in Rule 630 for jury challenges within the Commonwealth of Pennsylvania. Id. at 436; Commonwealth v. Davis 267 Pa.Super. 370, 375, 406 A.2d 1087, 1089 (1979); United States v. Sharma 190 F.3d 220, 231 (1999).

In addition to being untimely, the Petitioner failed to raise an appropriate jury challenge as required by the Pennsylvania Rules of Criminal Procedure; a jury challenge may only address the selection, empanelling or summoning of the jury. 42 Pa.R.Cr.P. 630. A Petitioner may not raise a jury challenge based upon only the disproportionate representation of a certain class of people on the jury panel.<sup>4</sup> Commonwealth v. Richbourg 260 Pa.Super. 438, 443, 394 A.2d 1007, 1009 (1978). A petitioner may, however, raise a jury challenge on the grounds that the prosecution systematically and deliberately excluded members of his race, or gender, from the jury. Id. at 1009; Commonwealth v.

<sup>4</sup> The United States Supreme Court in J.E.B. v. Alabama extended the protection afforded by the Equal Protection Clause forbidding peremptory challenges to the basis of gender as well as the basis of race. 511 U.S. 127, 130, 128 L.Ed.2d 89, 98 (1994).

Jackson 486 A.2d 431, 436 (1984); Commonwealth v. McIntosh 266 Pa.Super 425, 427, 405 A.2d 507, 508 (1979); Commonwealth v. Davis 267 Pa.Super. 370, 375, 406 A.2d 1087, 1089 (1979). It is the Petitioner's burden to prove a prima facie case of discrimination. Richbourg 394 A.2d 1007, 1009. The Petitioner's core complaint is that the composition of the jury was unconstitutional because it consisted of ten (10) women and (2) men. Although the Petitioner does allege ineffective counsel as the cause for the jury imbalance, he merely cites inappropriate use of peremptory challenges for support. Such an assertion, presented without additional evidence, has been found to be insufficient to uphold a claim against counsel. Commonwealth v. Martin 336 A.2d 290, 293 (1975).

Finally, the Commonwealth argues that the Petitioner's serial filing of PCRA petitions is vexatious and a waste of the Court system's resources. As clearly stated by the Pennsylvania Supreme Court in Commonwealth v. Peterkin, 554 Pa. 547, 557, 722 A.2d 638, 643 (1999): "At some point litigation must come to an end. The purpose of law is not to provide convicted criminals with the means to escape well-deserved sanctions, but to provide a reasonable opportunity for those who have been wrongly convicted to demonstrate the injustice of their conviction." By continuing the Petitioner's appeal, the court system is providing the Petitioner with means to manipulate the legal jargon of his claims until he escapes his jury trial conviction.

The Petitioner has presented several issues in his Petition for Post Conviction Relief; however, the issues presented are either not preserved for review because the petitioner did not file then in a timely fashion, or the issues are meritless. Consequently, Petitioner's habeas corpus petition should be dismissed.

Appendix

**Appendix A** - July 20 & 21, 1993 Transcript of Appellant's Trial before John H. Chronister, Judge, York County Court of Common Pleas, Criminal Division.

**Appendix B** - July 27, 1993 Motion for a New Trial.

**Appendix C** - August 19, 1993 Transcript of the Proceedings on Appellant's Motion for a New Trial before John H. Chronister, Judge, York County Court of Common Pleas Criminal Court Division.

**Appendix D** - September 2, 1993 Transcript of Appellant's Sentencing Proceedings before John H. Chronister, Judge, York County Court of Common Pleas, Criminal Court Division.

**Appendix E** - September 10, 1993 Petition for Reconsideration of Sentence.

**Appendix F** - September 30, 1993 Transcript of the Proceedings on Appellant's Petition for Reconsideration of Sentence before John H. Chronister, Judge, York County Court of Common Pleas, Criminal Court Division. Motion was denied.

**Appendix G** - October 4, 1993 pro se Motion of Judgment of Acquittal Not Withstanding the Verdict of a New trial.

**Appendix H** - October 22, 1993 Petition to Remand to Court of Common Pleas, filed by Appellant's Trial Counsel, requesting appointment of new counsel for Appellant and further recommending that Appellant's pro se Motion, filed on September 30, 1993, be treated as a petition under the Post Conviction Relief Act.

**Appendix I** - November 5, 1993 Order of the Superior Court of Pennsylvania remanding Appellant's case to the Court of Common Pleas of York County for the appointment of new counsel.

**Appendix J** - December 1, 1993 Order of the Court of Common Pleas, Criminal Court Division, appointing Appellant new counsel.

**Appendix K** - February 16, 1994 Order of the Court of Common Pleas of York County rescheduling Appellant's Post Conviction Relief Act Hearing originally scheduled for March 28, 1994 to April 12, 1994, due to witness unavailability.

**Appendix L** - June 16, 1994 Order of the Court of Common Pleas of York County generally continuing appellant's Post Conviction Relief Act Hearing due to Appellant's incarceration in the State of Indiana.

**Appendix M** - December 14, 1995 Superior Court Memorandum affirming Appellant's Judgment of Sentence rendered by the Court of Common Pleas of York County on September 2, 1993 in response to Appellant's appeal.

**Appendix N** - January 30, 1996 Transcript for Post Conviction Relief Act Hearing before John H. Chronister, Judge, Court of Common Pleas of York County, Criminal Division. Motion was denied.

**Appendix O** - May 30, 1997 Order of the Pennsylvania Supreme Court denying Appellant's Petition for Allowance of Appeal.

**Appendix P** - Application for Habeas Corpus Review filed on November 1, 1997.

**Appendix Q** - July 17, 1998 Order of the United States District Court for the Middle District of Pennsylvania dismissing with prejudice Appellant's petition for writ of habeas corpus for failing to exhaust state remedies.

**Appendix R** - December 7, 1998 Appellant's second petition for post-conviction relief filed.

**Appendix S** - December 9, 1998 Order of the court of Common pleas, York County, John H. Chronister, Judge, denying Appellant's second petition for post-conviction relief.

**Appendix T** - February 18, 1999 Motion to Vacate Judgment or to Set Aside Sentence filed by Appellant.

**Appendix U** - March 2, 1999 Order of the Court of Common Pleas, York County, John H. Chronister, Judge, denying Appellant's motion to Vacate Judgement or to Set Aside Sentence and treating same as a third petition for post-conviction relief.

**Appendix V** - February 8, 2000 Order of the Superior Court of Pennsylvania, affirming the March 2, 1999 order of the Court of Common Pleas.

**Appendix W** - July 25, 2000 order of the Pennsylvania Supreme Court denying Appellant's Petition for allowance of appeal.

Respectfully submitted,

Date: 7/27/01



William H. Graff, Esq.  
Chief Deputy Prosecutor  
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(717) 771-9600  
I.D. #43663

**CERTIFICATE OF SERVICE**

I hereby certify that on this            day of July 2001, I served the foregoing motion on the following person by First Class Postage Prepaid:

**CALVIN WILLIAM ROTH, JR.  
HOUTZDALE STATE CORRECTIONAL INSTITUTE  
ROUTE 2007  
P.O. BOX 1000  
HOUTZDALE, PA 16698-1000**



William H. Graff, Esquire  
Chief Deputy Prosecutor  
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28 East Market Street  
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October 13, 1993

Thomas H. Kelley, Esquire  
District Attorney's Office  
28 East Market Street  
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J. David MacVeigh, Esquire  
Public Defender's Office  
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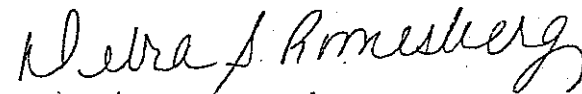
RE: Commonwealth VS. Calvin W. Roth, Jr.  
No. 2341 C. A. 1992

Counsel:

The transcript of the trial held on Tuesday and Wednesday, July 20 & 21, 1993, before the Honorable John H. Chronister, Judge, in the above-captioned matter is finished. The original has been lodged with the Clerk of Court's Office.

The transcript will be duly certified and made a part of the record within five days from the date of this notice unless objection is made thereto.

Sincerely yours,

  
Debra S. Romesberg,  
Official Court Reporter

cc: Russell A. Myers, District Court Administrator  
Honorable John H. Chronister, Judge

IN THE COURT OF COMMON PLEAS OF YORK COUNTY,  
PENNSYLVANIA

COMMONWEALTH : No. 2341 C. A. 1992  
:   
VS : 1) Escape  
: 2) Rape  
CALVIN W. ROTH, JR. : 3) Terroristic Threats

York, Pa., July 20 & 21, 1993

Before the Honorable John H. Chronister, Judge  
and a Jury

APPEARANCES:

THOMAS H. KELLEY, Esquire  
Assistant District Attorney  
For the Commonwealth

J. DAVID MACVEIGH, Esquire  
Assistant Public Defender  
For the Defendant

TRANSCRIPT OF PROCEEDINGS

Reported by:

Debra S. Romesberg,  
Official Court Reporter

1	<u>INDEX TO WITNESSES</u>				
2		<u>DIRECT</u>	<u>CROSS</u>	<u>R-D</u>	<u>R-C</u>
3	<u>FOR THE COMMONWEALTH:</u>				
4	Janet M. Hlafka	25	37	39	42
5	Marvin Lipscomb	43	50	51	52
6	George S. Chacona	57	65	--	--
7	James D. Ankrum	66	--	--	--
8	<u>FOR THE DEFENDANT:</u>				
9	Jeffrey S. Snell	71	74	75	--
10	Calvin W. Roth, Jr.	75	82	--	--
11	Walter D. Gladstone	87	89	--	--
12	<u>IN REBUTTAL:</u>				
13	Donald Overmoyer	92	94	--	--
14	George S. Chacona	95	96	97	--

15	<u>INDEX TO EXHIBITS</u>	
16	<u>FOR THE COMMONWEALTH:</u>	<u>MARKED</u>
17	No. 1 - Results of analysis	70
18	No. 2 - Results of analysis	70
19	<u>FOR THE DEFENDANT:</u>	
20	No. 1 - Photograph	37
21		
22		
23		
24		
25		

1 (PROCEEDINGS HELD ON TUESDAY, JULY 20, 1993)

2 \* \* \*

3 (Whereupon, the following discussion  
4 was held on the record at sidebar:)

5 \* \* \*

6 MR. KELLEY: Dave, what I had said to  
7 the Judge was you are willing to stipulate to the  
8 analysis of the seminal fluid found within the  
9 victim, that being the Defendant's, as well as on her  
10 clothing.

11 MR. MACVEIGH: Correct.

12 MR. KELLEY: Okay. So we will just --  
13 without the necessity of bringing someone from the  
14 Pennsylvania State Police down here to describe the  
15 lab analysis, we would just move the analysis into  
16 evidence. So you wouldn't have any problem with it  
17 being a business record because we don't have anyone  
18 to lay the foundation?

19 MR. MACVEIGH: No problem. Are you  
20 going to put on a doctor?

21 MR. KELLEY: No.

22 MR. MACVEIGH: Might then also get the  
23 doctor's report that was done at the hospital, at  
24 least a photocopy of it. Any objection to that?

25 MR. KELLEY: No.

1 MR. MACVEIGH: Okay. We'll also  
2 stipulate that he was in lawful custody at the time  
3 that he absconded himself.

4 MR. KELLEY: From lawful custody.

5 MR. MACVEIGH: Yeah. I don't think --  
6 they don't need to bring over his probation officer  
7 to testify who testified at the preliminary hearing.

8 THE COURT: What are the charges?

9 MR. KELLEY: Escape, rape and  
10 terroristic threats.

11 THE COURT: And circumstances, factual  
12 circumstances?

13 MR. KELLEY: That the victim was  
14 voluntarily a patient in a drug and alcohol  
15 rehabilitation facility. That the Defendant was  
16 there pursuant to a probationary or parole sentence.  
17 That the victim was asleep on her bed and was  
18 awakened by the Defendant who was on top of her, was  
19 holding her arms down with his knees, and who  
20 proceeded to rape her, and then re-clothing himself  
21 said, If you tell anyone, I'll kill you. She went  
22 downstairs, told another patient at the institution,  
23 and then they went from there to the hospital, et  
24 cetera.

25 THE COURT: Where does escape come in?

1 MR. KELLEY: He left after this all  
2 occurred. So we are going to be seeking a flight  
3 instruction as well, Your Honor. He was lawfully  
4 incarcerated, and he left from Colonial House and was  
5 finally a couple months later extradited from --  
6 where was it, Indiana, where he was picked up there  
7 for an aggravated assault.

8 THE COURT: Maybe I'm missing  
9 something, but how is his being in a halfway house--  
10 not a halfway house?

11 MR. KELLEY: It was a halfway house.  
12 I mean he was on the tail end of his sentence in a  
13 halfway.

14 MR. MACVEIGH: He was serving a  
15 sentence from Adams County, and he had a minimum date  
16 for the sentence was June the 12th?

17 MR. KELLEY: Yeah, he was in -- I said  
18 parole, but that was incorrect.

19 MR. MACVEIGH: And he had not yet been  
20 paroled. The tail end of his sentence was to be in  
21 the rehab.

22 THE COURT: Not parole?

23 MR. KELLEY: That's my fault. I  
24 apologize for that.

25 THE COURT: And this is an Adams

1 County sentence that he's escaping from?

2 MR. MACVEIGH: Correct.

3 MR. KELLEY: He was in York County at  
4 the time though.

5 THE COURT: Did I understand as part  
6 of the stipulation that he was agreeing he was in  
7 custody and left?

8 MR. MACVEIGH: Essentially he's  
9 pleading guilty to that.

10 THE COURT: Would the jury -- if he  
11 did plead guilty to that without the jurors  
12 consideration, wouldn't that take an element of  
13 prejudice out of the Commonwealth's case? All the  
14 jury would have to know is he is at a rehab facility  
15 and what happened happened rather than being told  
16 that he was in prison and this and that.

17 MR. MACVEIGH: That's what I mean. I  
18 was willing to stipulate to that, but I'll talk with  
19 him.

20 THE COURT: If you are going to  
21 stipulate, it seems in his interest to plead guilty  
22 to it. I assume the Commonwealth would agree any  
23 sentence he would get would be concurrent with the  
24 rape?

25 MR. KELLEY: Yeah, we would agree do



1 that.

2 MR. MACVEIGH: I'll talk to him.

3 \* \* \*

4 (Whereupon, the discussion held at  
5 sidebar was concluded.)

6 \* \* \*

7 MR. MACVEIGH: Do you want him to  
8 execute a colloquy first?

9 THE COURT: No, I don't believe it's  
10 necessary.

11 MR. MACVEIGH: Do you want to conduct  
12 one with him now?

13 MR. KELLEY: Shall I call the case,  
14 Your Honor?

15 THE COURT: Yes.

16 MR. KELLEY: Your Honor, the  
17 Commonwealth calls the case of Commonwealth versus  
18 Calvin William Roth, Jr., 2341 Criminal Action of  
19 1992. Defendant is charged with escape, rape and  
20 terroristic threats. He is before you, Your Honor,  
21 to plead guilty to the charge of escape.

22 THE COURT: Mr. Roth, in discussing  
23 the case with the attorneys in order to make some  
24 pretrial rulings, your attorney advised me that there  
25 was a stipulation that at the time this event

1 occurred that you were serving time in Adams County  
2 for simple assault, and that you had been sent to the  
3 Colonial halfway house here in York for the tail end  
4 portion of that sentence, but that it was stipulated  
5 that you were still legitimately in custody and that,  
6 in fact, you admitted that you had left that  
7 facility.

8                   Therefore, it was my conclusion that  
9 if you were serving a sentence and you were in  
10 custody and you left, that in effect you were  
11 pleading guilty to escape. While he wasn't saying  
12 that in so many words, the stipulation had the same  
13 effect.

14                   It also struck me that if that was the  
15 case, that you might be better off simply pleading  
16 guilty to that charge and removing it from the jury's  
17 consideration because if you pled guilty to that  
18 charge, the jury then would not necessarily know that  
19 you had previously been convicted of another offense  
20 and that you were incarcerated previously and simply  
21 hear the details of the other offenses, the rape and  
22 terroristic threats, and they would make a judgment  
23 as to guilt or innocence solely on that testimony,  
24 and they would not hear about your previous  
25 incarceration. I suggested to your attorney to talk

1 to you about that. Has he done so?

2 DEFENDANT ROTH: Yes.

3 THE COURT: And have you had  
4 sufficient time to talk to him about it?

5 DEFENDANT ROTH: Yeah.

6 THE COURT: And he now advises the  
7 Court that you are willing to enter a plea of guilty  
8 to the charge of escape, and that you still wish to  
9 proceed to trial on the other charges?

10 DEFENDANT ROTH: Yes, I do.

11 THE COURT: All right. And you  
12 understand you don't have to plead guilty? You have  
13 a right to have a trial on the escape charge as well?

14 DEFENDANT ROTH: No, I plead guilty to  
15 it.

16 THE COURT: I still have to give you  
17 your rights before I can take the plea.

18 And you understand that just like with  
19 the other charges you have a right to have a jury  
20 trial, that the jury would have to be convinced  
21 beyond a reasonable doubt, that you would have the  
22 right to help select the jury, that it would be a  
23 jury of your peers, that you would be entitled to  
24 challenge certain jurors just for no reason at all,  
25 what we call challenge for cause, and that the

1 Commonwealth would have the burden of proving the  
2 case against you. They would have to bring in  
3 witnesses to prove each and every element of the  
4 crimes charged, and they would have to do so beyond a  
5 reasonable doubt. Do you understand those trial  
6 rights?

7 DEFENDANT ROTH: Yes, I do.

8 THE COURT: And you understand by  
9 pleading guilty to the escape charge, you are waiving  
10 those rights?

11 DEFENDANT ROTH: Yeah.

12 THE COURT: All right. This Court  
13 will accept the guilty plea for the charge of escape,  
14 and we direct that that matter not proceed to the  
15 jury, and that the fact of the Defendant's prior  
16 conviction and relating to the escape charge per se  
17 not be part of the testimony in the case.

18 MR. MACVEIGH: Your Honor, one other  
19 thing that was mentioned at sidebar which I've also  
20 told my client about was that the Commonwealth had  
21 agreed if my client is convicted of the other  
22 charges, that any sentence he might receive for the  
23 rape -- pardon me, for the escape charge would run  
24 concurrent with either or both.

25 THE COURT: We'll note that plea

1 agreement for the record. Okay. We are ready to  
2 proceed on the other charges. I need you to sign  
3 your name on the back of the information for the  
4 escape, and we'll withhold any sentencing until the  
5 conclusion of the trial. Okay. We'll proceed with  
6 the trial.

7 THE COURT: Swear the jury.

8 \* \* \*

9 (Whereupon, the prospective jury panel  
10 was sworn.)

11 \* \* \*

12 MR. KELLEY: Your Honor, in the matter  
13 of Commonwealth versus Calvin W. Roth, Jr., 2341  
14 Criminal Action of 1992, charges of rape and  
15 terroristic threats, Commonwealth is ready to proceed  
16 with voir dire, Your Honor. Attorney MacVeigh. Mr.  
17 Roth. Ladies and gentlemen, good afternoon.

18 THE PROSPECTIVE JURY PANEL: Good  
19 afternoon.

20 MR. KELLEY: My name is Tom Kelley  
21 from the District Attorney's office of York. This is  
22 the period within a trial in which counsel for the  
23 Defendant and for the Commonwealth asks you as  
24 potential jurors certain questions. The reasoning  
25 behind this is so that we can get a clear cross

1 section of the county because as I'm sure you all  
2 know, no one commits a crime in this county until a  
3 jury of twelve of that person's peers say they  
4 committed a crime in this county. So we are going to  
5 ask you some questions.

6 First of all, please don't -- if  
7 anything is asked of you that's too personal, please  
8 don't take offense. This doesn't reflect on your  
9 abilities as jurors. We are just trying to give the  
10 Defendant here, Mr. Roth, the fairest trial possible.

11 So, first of all, I'm going to ask if  
12 anyone recognizes anyone involved in this case.  
13 First of all, I don't see any familiar faces. Does  
14 anyone recognize me?

15 The victim in this matter is Miss  
16 Janet Velte. She's over here. Janet, could you  
17 stand up for a second, please? Does anyone recognize  
18 her? She's from Maryland so it's quite possible you  
19 wouldn't.

20 Okay. There's another witness the  
21 Commonwealth will call. His name is Donald  
22 Overmoyer. Sir, could you stand up, please? Does  
23 anyone recognize him? He's from Adams County. No.  
24 Okay.

25 Marvin Lipscomb is another witness the

1 Commonwealth would probably call. Does anyone  
2 recognize him? He runs the Colonial House. Does  
3 that name ring a bell with anyone? Anyone have any  
4 family that's ever been at the Colonial House? No.  
5 Okay.

6 There's some police officers involved  
7 in this case. We have a detective here, Detective  
8 Snell. He's from West Manchester Township. Does  
9 anyone recognize him?

10 Some other witness is Mr. George  
11 Chacona. He's from northern New York. Mr. Chacona,  
12 could you stand up. Does anyone recognize him? He  
13 spent some time in York County, however, it's quite  
14 possible that no one would have met him.

15 Finally, another officer from West  
16 Manchester police is Officer Ankrum. Does anyone  
17 recognize him? No. That would be the Commonwealth  
18 witnesses, and I don't think anyone recognized any of  
19 our witnesses.

20 How about the Defendant, Mr. Roth.  
21 Does anyone recognize him? His attorney is the First  
22 Assistant Public Defender, David MacVeigh. Does  
23 anyone recognize him? Great. Thank you very much.

24 There's some other questions I'd like  
25 to ask you. First of all, although I work as a

1 prosecutor, my job is not prosecution. I am here to  
2 see that justice is done. Therefore, I'm going ask  
3 you some questions that are pertinent for the  
4 Defendant. The Defendant need not in this case take  
5 the stand. That's his constitutional right. Would  
6 anyone have a problem if the Defendant did not take  
7 the stand?

8 THE COURT: Mr. Kelley, I think it  
9 would be appropriate to let Mr. MacVeigh ask the  
10 defense questions.

11 MR. KELLEY: Okay. I have some  
12 questions regarding whether any of you would have a  
13 predisposition in this case. The Defendant is  
14 charged with rape. You'll hear testimony by the  
15 victim that she did not fight. She did not incur any  
16 injuries. Would the fact that she did not fight her  
17 assailant would that make you believe that a rape  
18 could not have been committed? Does anyone have an  
19 answer they'd like to express? No. Okay.

20 Some other questions for you. Anyone  
21 here related to any police officers closely? How  
22 about guards for any of the county or state prisons?  
23 Anyone related to any guards? Okay.

24 Is anyone involved in any victim's  
25 rights groups, advocates for victims which would



1 predispose you one way or the other in this type of  
2 case?

3 Finally, and I hope this doesn't get  
4 too personal, has anyone ever been the victim of an  
5 offensive touching or assault of any kind? No.  
6 That's a pretty broad statement, but has anyone been  
7 the victim of that? Anyone related to anyone who was  
8 a victim in one of those types of cases? Ma'am, your  
9 name, please?

10 JUROR NO. 25, JUDITH S. COUCH: Judy  
11 Couch.

12 MR. KELLEY: Judy Couch?

13 JUROR NO. 26, JUDITH S. COUCH: Yes.

14 MR. KELLEY: Are you related to  
15 someone that was involved in one of those types of  
16 cases?

17 JUROR NO. 26, JUDITH S. COUCH: Yes.

18 MR. KELLEY: Were you closely related  
19 to them?

20 JUROR NO. 26, JUDITH S. COUCH: Yes.

21 MR. KELLEY: And they were a victim?

22 JUROR NO. 26, JUDITH S. COUCH: Yes.

23 MR. KELLEY: Did you ever speak to her  
24 or him about this event?

25 JUROR NO. 26, JUDITH S. COUCH: Yes.

1 MR. KELLEY: Would the fact that you  
2 are aware of this -- I'm assuming you were close to  
3 the person because you spoke to them about that.  
4 Would that affect your ability to sit in this case  
5 for the Defendant?

6 JUROR NO. 26, JUDITH S. COUCH: No.

7 MR. KELLEY: Another right to  
8 defendants is as he stands before you he is presumed  
9 innocent.

10 THE COURT: Mr. Kelley, I prefer you  
11 let the defense ask the defense questions.

12 MR. KELLEY: Thank you, Your Honor. I  
13 don't think I have any other questions for you. I  
14 thank you all for your candor, especially you, ma'am.

15 Does anyone have any information that  
16 they think the Court should know from what you've  
17 heard from the Commonwealth's point of view? Okay.  
18 Thank you very much, folks.

19 MR. MACVEIGH: If the Court, please.  
20 Mr. Kelley. Officer Snell. Ladies and gentlemen,  
21 other than perhaps one or two faces I saw here about  
22 this time 24 hours ago when I was trying another  
23 case, does anybody recognize me for any reason? None  
24 of you look familiar to me, but occasionally paths  
25 cross.

1                   As Mr. Kelley asked a number of  
2                   questions that I would have asked, and I will  
3                   probably keep them as general as well, we don't wish  
4                   to pry into any of your lives, and picking a jury in  
5                   some respects is the most difficult of trying cases.  
6                   So that if we can find out a little bit about you  
7                   without looking deep inside your soul, it helps us in  
8                   the judgment of whether or not we believe that a  
9                   person is someone we would want to have sit on that  
10                  jury or not.

11                  I want all of you to realize though  
12                  that we are starting out with 26, and in American law  
13                  it's typically 12 jurors. So that some will be  
14                  removed, but that is no reflection on you  
15                  individually as a group. If you're not chosen, it  
16                  doesn't mean that we think you're bad people. It's  
17                  what, Tuesday afternoon. Some of you might have  
18                  already sat on juries this term. Could I see a show  
19                  of hands those individuals who have been on juries?  
20                  So none of you have been.

21                  Have any of you had prior jury  
22                  experience, particularly criminal trials, in the  
23                  past? It's Miss Coker in the front.

24                  JUROR NO. 39, JOSEPH E. ELINE: You  
25                  only want criminal? Mine was civil.

1 MR. MACVEIGH: We'll cover civil.

2 Sir, I take it you've sat as a civil jurist?

3 JUROR NO. 39, JOSEPH E. ELINE: Right.

4 MR. MACVEIGH: In the back row, sir,  
5 your name is Mr. Bair?

6 JUROR NO. 5, JAMES P. BAIR: Yes.

7 MR. MACVEIGH: And yours was criminal?

8 JUROR NO. 5, JAMES P. BAIR: Yes.

9 MR. MACVEIGH: Anyone else?

10 MR. MACVEIGH: Yes, ma'am. Your name  
11 is?

12 JUROR NO. 142, ROSALIE M. SMITH:  
13 Smith.

14 MR. MACVEIGH: Civil or criminal?

15 JUROR NO. 142, ROSALIE M. SMITH:  
16 Civil.

17 MR. MACVEIGH: Okay. Anybody else?  
18 Yes, sir. Your name would be?

19 JUROR NO. 54, JAMES R. GRAHAM:  
20 Graham.

21 MR. MACVEIGH: Civil or criminal?

22 JUROR NO. 54, JAMES R. GRAHAM: Civil.  
23 I was picked twice. Never sat on a jury though.

24 MR. MACVEIGH: Oh, I'm sorry. Thank  
25 you, sir. And your name, please?

1 JUROR NO. 27, LOWRIE C. CRAWFORD:

2 Crawford, civil.

3 MR. MACVEIGH: Have any of you been  
4 the victims or had family or close friends who have  
5 been the victims of crimes involving -- Mr. Kelley  
6 referred to it as offensive touching. My client is  
7 also charged with an offense called terroristic  
8 threats which is basically a threat of harm that puts  
9 somebody in fear, although that threat might not  
10 necessarily be carried out. Have you or any of your  
11 family members been victims of that crime? All  
12 right.

13 The case here the most serious offense  
14 my client is charged with is rape, and there are  
15 essentially in the defense of rape cases one of two  
16 defenses available. Either, No. 1, the individual  
17 didn't do it because he was elsewhere; or, No. 2,  
18 there was intercourse but it was consensual.

19 Do any of you believe that a person  
20 who, for example, is in an alcohol rehabilitation  
21 program inpatient would be incapable of giving  
22 consent to an act of sexual intercourse? Okay.

23 My client, as Mr. Kelley pointed out,  
24 is to be presumed innocent. Do any of you have any  
25 basic problem with the presumption of innocence,

1 which means that even though police have arrested  
2 him, he's presumed innocent until they prove him  
3 guilty, and right now he sits here innocent. Do any  
4 of you have any difficulty with that? If you do,  
5 please tell me.

6 Could we come to sidebar for a minute?

7 THE COURT: Yes.

8 \* \* \*

9 (Whereupon, a discussion was held off  
10 the record at sidebar.)

11 \* \* \*

12 MR. MACVEIGH: That's all I have.  
13 Just one other. Is there anybody here who for  
14 whatever reason, and you don't have to tell us why,  
15 just feel uncomfortable, feel sick, whatever, doesn't  
16 want to sit on this jury? If so, tell me. Okay.  
17 Thank you.

18 Oh, I do have one more witness, Mr.  
19 Gladstone. Does anyone know this individual? His  
20 name is Walter Gladstone. He may be testifying later  
21 in the trial.

22 THE CLERK: Okay. Jury selection is  
23 completed. As I call your name, will you please  
24 proceed to the jury box. Laureen Clark, Kimberly  
25 Bloom, Brenda Markley, Melissa Lovelace, Linda

1 Wagner, Melinda Streicker, Virginia Stough, John  
2 Faust, Maria Lighty, Rosalie Smith, Vincent Williams,  
3 and Jane Ware.

4 THE COURT: Rest of the jurors may  
5 return to the Central Jury Room. Swear the jury.

6 \* \* \*

7 (Whereupon, the jury panel was  
8 selected and sworn.)

9 \* \* \*

10 THE COURT: You may proceed.

11 MR. KELLEY: Thank you, Your Honor.  
12 May it please the Court. Attorney MacVeigh.

13 MR. MACVEIGH: Mr. Kelley.

14 MR. KELLEY: Mr. Roth. Ladies and  
15 gentlemen, this is what we call an opening statement.  
16 In criminal proceedings this is where I outline and  
17 highlight what we are going to prove in the  
18 Commonwealth's case, what we'll prove through our  
19 witnesses and their testimony.

20 The Commonwealth is going to prove to  
21 you through this victim that on May 25th, 1992, at  
22 the Colonial House, which is a drug and alcohol  
23 rehabilitation center, she was attending voluntary  
24 treatments there. That between the hours of 5 p.m.  
25 and 7 p.m. that she was asleep after dinner. She was

1 awakened. She felt a force on her chest and on her  
2 arm area pinning her down.

3 She'll tell you that when she  
4 awakened, she saw a man who she knew at the Colonial  
5 House, being the Defendant, on top of her. The  
6 Defendant made various remarks to her, held her down,  
7 and proceeded to have sexual intercourse with the  
8 victim. The Defendant got up off the victim, and as  
9 he was putting his clothes on said, If you tell  
10 anyone about this, I'll kill you.

11 That's essentially the Commonwealth's  
12 case, and the victim will tell you that. She'll  
13 relate it to you in detail.

14 The next witness the Commonwealth will  
15 put on will be Mr. George Chacona. Mr. Chacona will  
16 tell you he was very familiar with the victim. At  
17 approximately 7, around that time, maybe a little  
18 later, he saw the victim. The victim's hair was wet,  
19 was hanging in her face, and she was visibly shaken,  
20 uncontrollably shaken.

21 He immediately went to her in an  
22 attempt to help her and tried to question her to find  
23 out what was going wrong. He will tell you that he  
24 couldn't even get her to speak for nearly an hour.  
25 He will tell you that when he finally did get her to



1 speak, the words out of her mouth were, Rape. He  
2 will tell you he accompanied her up to the Colonial  
3 House where he spoke to one of the counselors.

4 They then went to the victim's room  
5 where the rape had occurred. She couldn't even enter  
6 into her room. She merely said to Mr. Chacona,  
7 That's the bag, pointed a bag out which contained  
8 items of clothing, items of clothing which you'll  
9 hear contained semen, semen of the Defendant.

10 We'll have some other additional  
11 testimony. It would be essentially what we call  
12 corroborative testimony. It will be testimony of  
13 other officers who were able to view the victim.  
14 They will tell you how she appeared and what she  
15 said.

16 Finally, and I'd like to relate back  
17 to the victim again, she will tell you that she never  
18 gave consent to the Defendant for him to have sex  
19 with her, that she feared for her life, that she was  
20 frozen and unable to move, that she is not the  
21 Defendant's wife, and that the intercourse was  
22 unlawful.

23 That is what the Commonwealth will  
24 prove, and to that end I will let my witnesses speak.  
25 Thank you very much.

1 MR. MACVEIGH: If the Court please.  
2 Mr. Kelley.

3 MR. KELLEY: Mr. MacVeigh.

4 MR. MACVEIGH: Detective Snell. Good  
5 afternoon. As all of us know, there are two sides to  
6 every story. Sometimes those stories will vary in  
7 significant detail. Sometimes they'll vary in minor  
8 details, but we always know that there's two sides.

9 As my client sits in front of you, he  
10 is presumed innocent, and you will maintain, I trust,  
11 that presumption of innocence in the minds of each of  
12 you until the Commonwealth, if it can, proves to you  
13 his guilt beyond a reasonable doubt.

14 You will hear a different side of the  
15 story. You will hear Calvin Roth tell you, yes, he  
16 had intercourse with this lady, but that it was under  
17 circumstances of consent. You will hear him describe  
18 how he had been on pretty good terms with this lady  
19 prior to this. You will see a photograph that shows  
20 these two people smiling. They're side by side  
21 smiling to the camera.

22 You will hear Walter Gladstone, who  
23 was introduced to you, describe to you what he knows  
24 of the relationship between Calvin Roth and Janet  
25 Velte. I may mispronounce her name. If I do,

1 forgive me.

2 You will hear other testimony, ladies  
3 and gentlemen, about what the rules are in the  
4 Colonial House, what the consequences are of breaking  
5 those rules, and you will then understand at the end  
6 why some of the evidence was presented to you.

7 I hope that as you listen to the case  
8 you give it your undivided attention. I believe you  
9 will. I don't believe you would be here if you  
10 wouldn't. You would have told me you didn't want to  
11 be here. I hope I can trust that my trust is  
12 properly placed in the twelve of you and in your  
13 collective judgment. Thank you.

14 THE COURT: You may call your first  
15 witness.

16 MR. KELLEY: Thank you, Your Honor.  
17 Your Honor, Commonwealth calls Janet Velte to the  
18 stand.

19 \* \* \*

20 JANET M. HLAFKA,  
21 called as a witness, having been duly sworn according  
22 to law, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. KELLEY:

25 Q Janet, could you state your full name,

1 please, for the record.

2 A Janet Marie Hlafka, H-l-a-f-k-a.

3 \* \* \*

4 THE COURT: Okay. Janet, could you  
5 pull up a little closer to the microphone so we can  
6 hear you.

7 \* \* \*

8 BY MR. KELLEY:

9 Q Your name used to be Janet Velte, is that  
10 correct?

11 A Correct.

12 Q What state do you live in now, Janet?

13 A Maryland.

14 Q Maryland. Let me refer you to the date  
15 May 25th, 1992, and ask you what state you lived in  
16 on that date?

17 A Maryland.

18 Q Okay. Were you spending any time in York  
19 at that time, May 25th, 1992?

20 A Yes.

21 Q Where were you?

22 \* \* \*

23 THE COURT: Can the jury hear all  
24 right?

25 THE JURY: Yes.

\* \* \*

1

2

BY MR. KELLEY:

3

Q Specifically, Janet where were you staying  
4 at that time?

5

A At the Colonial House.

6

Q Why were you staying at the Colonial  
7 House, Janet?

8

A Because I wanted to do something for  
9 myself, rehabilitation center for alcohol.

10

Q You had an alcohol problem?

11

A Yes, I did.

12

Q Were you familiar with the Defendant when  
13 you were there?

14

A Yes.

15

Q Were you friends with him?

16

A I was friends with a lot of people there.

17

Q Did you at least know the Defendant?

18

A Yeah, that's about it.

19

Q Were you familiar with him?

20

A Yeah, everybody was.

21

Q Did you ever do anything with the  
22 Defendant, talk to him?

23

A Sure I talked to him. He talked to me.

24

Talked to a lot of people. That's the interaction

25

that was suppose to be going on there.

1 Q I want to refer you again to that date,  
2 May 25th, 1992. Around dinner time, right after  
3 dinner where were you at that time?

4 A I was sleeping.

5 Q You were sleeping. What time did you  
6 finish dinner on that date?

7 A Around 5, 5:30.

8 Q And where were you sleeping?

9 A In my room.

10 Q You had a room there?

11 A Assigned to me.

12 Q Did you have any roommates while you were  
13 there?

14 A No.

15 Q Anything unusual happen to you while you  
16 were sleeping on July 25th?

17 A Yes.

18 Q Could you please describe for the jury  
19 what was your first -- what is your first memory of  
20 after being awakened from sleep on the 25th, please,  
21 Janet?

22 A I woke up to a knee in my gut and a hand  
23 over my mouth.

24 Q Okay. What happened when you awakened  
25 with a knee in your gut and a hand on your mouth?

1 Who did you see?

2 A Calvin.

3 Q You saw the Defendant right here?

4 A Yes, I did.

5 Q What happened when you opened your eyes,  
6 Janet? If you could tell the jury what happened when  
7 you opened your eyes?

8 A Calvin was on top of me.

9 Q Okay. What happened next, please?

10 A Told me he was going to get me.

11 Q I'm sorry?

12 A He told me that he was going to get me.

13 Q He told you he was going to get you?

14 A Yeah, and not to say a word.

15 Q What happened? Please describe for the  
16 jury what happened after he told you he was going to  
17 get you?

18 A He started to -- started to take -- take  
19 my clothes off.

20 Q What was the first item that he took off,  
21 Janet?

22 A My pants.

23 Q Your pants, Janet, were you wearing  
24 underwear on that day?

25 A Yes.

1 Q Did he do anything with your underwear?

2 A No.

3 Q He didn't pull your underwear down at all?

4 A Yeah.

5 Q After he pulled your pants and your  
6 underwear down, what happened next, please?

7 A He proceeded to have sex.

8 Q You said he proceeded to have sex with  
9 you. What do you mean? Could you please state for  
10 the jury what exactly happened?

11 A He put his penis in me and --

12 Q Where did he put his penis, Janet? Where  
13 did he put his penis, Janet?

14 A In my vagina.

15 Q Did it enter your vagina?

16 A Yes.

17 Q What was he doing with his hands at that  
18 point when he put his penis in your vagina?

19 A Trying to hold my mouth.

20 Q Hold your mouth?

21 A Yeah.

22 Q I want you to recall what he did with his  
23 right hand and his left hand, Janet?

24 A He had his right hand on my mouth, left  
25 hand trying to move everything around.



1 Q Was he on top of you at this time?

2 \* \* \*

3 MR. MACVEIGH: Judge, could we  
4 approach the bench.

5 THE COURT: Yes.

6 \* \* \*

7 (Whereupon, the following discussion  
8 was held on the record at sidebar:)

9 MR. MACVEIGH: Judge, I suppose the  
10 record will reflect that the witness is really now  
11 sobbing rather heavily, and Mr. Kelley gave her a  
12 glass of water. That hasn't calmed her down much.  
13 I'm going to have to ask for a recess. In fact,  
14 she's being helped out right now by the D.A. victim  
15 witness coordinator. I'd ask for a mistrial.

16 THE COURT: We'll take a brief recess  
17 to have her compose herself. We will oppose the  
18 Defendant's request for mistrial.

19 (Whereupon, the discussion held at  
20 sidebar was concluded.)

21 \* \* \*

22 THE COURT: Ladies and gentlemen we  
23 will take a brief recess to allow the witness to  
24 compose herself.

25 \* \* \*

1 (Whereupon, a recess was taken.)

2 \* \* \*

3 AFTER RECESS

4 THE COURT: You may continue.

5 MR. KELLEY: Thank you, Your Honor.

6 DIRECT EXAMINATION (Cont'd)

7 BY MR. KELLEY:

8 Q Janet, when the Defendant's penis was  
9 inside of you, where were his hands?

10 A His hands was on my shoulders.

11 Q Okay. Now, Janet, this question is going  
12 to sound a little odd, but I need you to answer it  
13 nonetheless. Are you married to the Defendant?

14 A No.

15 Q Have you every been married to the  
16 Defendant?

17 A No.

18 Q Did the Defendant prior to this ask you to  
19 engage in intercourse with him?

20 A No.

21 Q Did you at any time give your consent to  
22 intercourse with the Defendant prior to this?

23 A No, sir.

24 Q Janet, did he, the Defendant, inflict any  
25 wounds on you to your body?

1 A No, sir.

2 Q Did he hit you?

3 A No, sir.

4 Q Did you fight back at all, Janet?

5 A No, sir.

6 Q Why didn't you fight back, Janet?

7 A I was scared.

8 Q What were you afraid of?

9 A I was afraid of being killed or something.

10 Q Did the Defendant threaten you at all  
11 during the course of this?

12 A Yes.

13 Q What did he say in that respect?

14 A He said he'll kill me.

15 Q Did he say anything else?

16 A He said if I said anything to anyone, he  
17 would kill me.

18 Q How long did this entire episode go on for  
19 from start to -- from the time you first woke up  
20 until it was over?

21 A Fifteen minutes approximately. Felt like  
22 more.

23 Q Then what happened after the act was over?  
24 What happened?

25 A He got up, went to the door.

1 Q Did he say anything when he went to the  
2 door?

3 A Yes, he told me he'd kill me if I told  
4 anyone.

5 Q And then what happened?

6 A Then he left.

7 Q Where were your clothes at this time?

8 A Down on my ankles.

9 Q Okay. Janet, I want you to take a deep  
10 breath. Okay. What did you do after the Defendant  
11 left?

12 A I was in a whirlwind. I tried to get  
13 myself together. I really tried. Then I went --

14 Q Do you recall what you did with your  
15 clothing after this?

16 A Yes.

17 Q What did you do with it?

18 A I took a shower and put my clothing in a  
19 bag in the closet.

20 Q What did you do after that? Did you put  
21 the bag in the closet?

22 A I wanted to burn it all.

23 Q Did you burn it?

24 A No, sir.

25 Q What did you do?

1           A       I wandered. I wandered around. I didn't  
2 know where I was. I didn't feel my feet walking. I  
3 was just walking around. I couldn't tell you where I  
4 went.

5           Q       Do you recall meeting up with George  
6 Chacona?

7           A       At one point I can remember meeting up  
8 with him, yes.

9           Q       Do you remember how much time had elapsed  
10 between the time the Defendant left and the time --

11          A       It seemed like hours.

12          Q       You can't tell then how much time?

13          A       I would say a good four or five hours,  
14 something like that.

15          Q       Janet, where is the point -- where exactly  
16 did you meet up with George Chacona? Do you recall?

17          A       I think it was -- I think I was in the  
18 kitchen. Yeah, it was in the kitchen in like the  
19 little dining room area.

20          Q       Do you recall telling him what had  
21 happened to you?

22          A       No.

23          Q       You don't?

24          A       I don't recall saying anything to him  
25 about it.

1 Q What's the next thing you recall in your  
2 memory? What's the next thing you can remember  
3 between the time the Defendant left and that memory.  
4 What is the next thing you remember?

5 A I remember sitting down in the kitchen,  
6 like little dining room area not knowing what to say,  
7 if I should say anything, what to do. Like as if I  
8 just woke up down in the kitchen area as if I was --  
9 just all that time had expired.

10 Q Were you afraid?

11 A Yeah, I was terrified.

12 Q When this Defendant made that statement to  
13 you before he left, were you afraid then?

14 A Yes.

15 Q What were you afraid of?

16 A I was afraid of -- afraid of the  
17 Defendant. I was afraid of him killing me, strong  
18 arming me, bullying me, killing me, yeah.

19 Q Janet, do you recall going out to the York  
20 Hospital for an examination?

21 A Yes.

22 Q Do you recall who accompanied you there?

23 A George.

24 Q Prior to going there, if you could think  
25 in your mind backwards from that point. Hopefully

1 this will help what you recall backwards from there  
2 before you went to the hospital. What happened  
3 before that?

4 A I was sitting in an office. George was  
5 there.

6 Q Do you recall in whose office it was?

7 A No. I remember it was an office with  
8 chairs.

9 Q Do you remember ever going to your room  
10 after that?

11 A No.

12 Q That evening at all with George do you  
13 recall going to your room?

14 A No.

15 Q You had an examination at the hospital  
16 when you got there?

17 A Yes, sir.

18 MR. KELLEY: Nothing further at this  
19 time, Your Honor.

20 THE COURT: Cross-examine.

21 CROSS EXAMINATION

22 BY MR. MACVEIGH:

23 Q When you say that you woke up, so to  
24 speak, in the kitchen area and you also remember  
25 being in an office, were you in the kitchen or the

1 office first?

2 A The kitchen.

3 \* \* \*

4 (Whereupon, Defendant's Exhibit No. 1  
5 was produced and marked for identification.)

6 \* \* \*

7 Q I'm showing you a photograph that Mr.  
8 Kelley has already seen. It's marked as Defendant's  
9 Exhibit 1, and can you tell me who's shown in that  
10 photograph?

11 A That's Calvin and I.

12 Q Do you remember approximately when that  
13 photograph was taken?

14 A Yeah, it was in the evening. There was a  
15 lot of pictures taken that day, that evening.

16 Q Okay. This would have been before this  
17 happened? Obviously the photograph was taken before  
18 this happened?

19 A Yeah.

20 Q Okay. You were aware, I assume, of what  
21 the rules were in the Colonial House?

22 A Yes, sir.

23 Q Men and women were to be kept separated.  
24 There might not have been walls between, but men and  
25 women weren't to have any one-on-one contact with one



1 another, is that correct?

2 A If you mean giving hugs or something?

3 Q No, I mean of a more intimate nature.

4 A Oh, yes, yes.

5 Q And there would be some kind of  
6 consequence if you were to break those rules, is that  
7 correct, be it that you would be removed from the  
8 premises or asked to leave or something of that  
9 nature, is that correct?

10 A Maybe, maybe not.

11 MR. MACVEIGH: That's all.

12 REDIRECT EXAMINATION

13 BY MR. KELLEY:

14 Q Janet, did you ever hang out with Calvin  
15 at all?

16 A I didn't hang, no.

17 Q Do you smoke?

18 A Yes, sir.

19 Q Do you remember whether Calvin smokes?

20 A Yes.

21 Q Did you ever say outside hang out and have  
22 cigarettes with a bunch of other smokers?

23 A Oh, sure.

24 Q Calvin ever there?

25 A Yeah, behind a tree or in the distance but

1 never actually -- once in a while he'd be up near the  
2 door.

3 \* \* \*

4 MR. MACVEIGH: Judge, I'm sorry to  
5 have to object as being beyond the scope of  
6 cross-examination.

7 THE COURT: I think it's relevant in  
8 light of your introduction of the picture.

9 MR. MACVEIGH: I'm interested in what  
10 smoking has to do with any of this?

11 THE COURT: You got into their prior  
12 relationship. I think that's in that context. I'll  
13 permit it.

14 MR. KELLEY: Thank you.

15 \* \* \*

16 BY MR. KELLEY:

17 Q Janet, the picture that Mr. MacVeigh  
18 showed you, do you recall when that was taken  
19 exactly?

20 A No, not exactly. It was a lot of pictures  
21 taken there.

22 Q Do you have any pictures from when you  
23 were at Colonial House?

24 A I don't, but I know people who do.

25 Q Did you have your picture taken with

1 anyone else at Colonial House?

2 A Yeah, I believe so. Probably, yeah.

3 Q Did you ever hug Mr. Chacona back here?

4 A Sure.

5 Q Did you hug him when you were at Colonial  
6 House?

7 A Um-hum.

8 Q How many times did you hug Mr. Chacona at  
9 Colonial House just if you could estimate?

10 A Five times at most, I guess. I don't  
11 know.

12 Q You were involved in rehabilitation with  
13 an alcohol problem, is that correct?

14 A Correct.

15 Q Were you told to be quite open with the  
16 other people that were going through alcohol  
17 treatment?

18 A Yes, sir.

19 Q Did you have occasion to get up in front  
20 of the people and talk about your problems?

21 A Yes.

22 Q After you would talk about that, would  
23 you -- would anyone hug you afterwards?

24 A Sure, needed support.

25 Q Prior to the episode you just testified to

1 the jury about, would you consider Calvin an  
2 acquaintance?

3 A I wouldn't think of him as even a friend.

4 Q Were you friendly -- at least on friendly  
5 terms with him?

6 A Said as little as I had to without making  
7 him mad.

8 MR. KELLEY: Nothing further at this  
9 time, Your Honor.

10 RECROSS EXAMINATION

11 BY MR. MACVEIGH:

12 Q Were you on a retiring, quiet basis with  
13 most of the people there? Did you keep to yourself  
14 most of the time?

15 A Pretty much.

16 Q Not only just with Calvin but with most of  
17 the other residents there?

18 A Pretty much, yeah. Sure, pretty much.

19 MR. MACVEIGH: That's all. Thank you.

20 THE COURT: You may step down. I  
21 remind you that I'm going to stop for the day at  
22 3:30. Is there some witness that would be reasonably  
23 short that can be presented between now and 3:30?

24 MR. KELLEY: Your Honor, my next  
25 witness would probably take quite sometime. I don't

1 believe I would be able to do it within 15 minutes.

2 THE COURT: Is there some other  
3 witness you can call in his spot?

4 MR. KELLEY: I could call Marvin  
5 Lipscomb to the stand.

6 \* \* \*

7 MARVIN LIPSCOMB,  
8 called as a witness, having been duly sworn according  
9 to law, testified as follows:

10 DIRECT EXAMINATION

11 BY MR. KELLEY:

12 Q Mr. Lipscomb, your name and occupation,  
13 please?

14 A Marvin Lipscomb. I'm executive director  
15 of Colonial House.

16 Q And how long have you been so employed,  
17 sir?

18 A About 11 and a half years.

19 Q Can you describe what your duties are,  
20 sir?

21 A I'm responsible for the general running,  
22 physical hiring of therapists, and just the overall  
23 management.

24 Q Regarding the Colonial House, do you have  
25 any rules concerning interaction between males and

1 females who are under you?

2 A Yes, we do. Other than the therapeutic  
3 hugs that was mentioned here earlier, there is to be  
4 no sexual contacts whatsoever. In fact, if we find  
5 clients are getting a little too close to each other,  
6 we put them on a blackout to try to give them a  
7 cooling off period. If that continues, then they're  
8 discharged.

9 Q What would you call -- you say other than  
10 the hugs if there's any sexual contact, what sexual  
11 contact?

12 A Just any hand holding that would have  
13 people get more familiar other than just the casual  
14 relationships. Any hand holding or even just pairing  
15 off and talking, sticking with one person too much,  
16 we would put them on blackout.

17 Q Did you have a person under your  
18 control -- or not under your control, excuse me,  
19 within your program by the name of Calvin Roth?

20 A Yes, we did.

21 Q Did you also have someone in your program  
22 Janet Velte?

23 A Yes, we did.

24 Q Sometime around the 25th did you receive  
25 any information concerning the two of those

1 individuals?

2 A Yes, I was called at home, and my manager  
3 said that there had been an accusation made by Janet  
4 Velte against Mr. Roth.

5 Q Do you recall what time this was?

6 A I think it was somewhere between 8:30 and  
7 9 o'clock because I was up to the facility by about  
8 20 after 9.

9 Q Did you have occasion to speak to Miss  
10 Velte at that time?

11 A Yes, we did.

12 Q Okay. And you interviewed her?

13 A As well as we could.

14 Q You say as well as we could. Could you  
15 explain why you say that?

16 A Well, she was very distraught, very upset,  
17 and having a hard time getting control.

18 Q How long did you attempt to talk to her  
19 for?

20 A Probable about 10 or 15 minutes, and  
21 several of us tried.

22 Q Can you describe how she appeared?

23 A Very scared, very angry, just very  
24 emotionally distraught. Very, very emotionally  
25 distraught, not making a whole lot of sense. What's

1 the word I'm looking for. Kind of wandering around.  
2 Thoughts weren't in a pattern. It was a whole lot of  
3 different things going on.

4 Q Because of the discussion you had with  
5 Miss Velte did you have occasion to talk to Mr. Roth?

6 A Yes, I did.

7 Q When exactly was that?

8 A We were waiting for them to return. They  
9 had been outside to a meeting, and when he returned,  
10 I got Mr. Roth and I said that there's been an  
11 accusation made. I had him in my office, and I said,  
12 I would like you to wait in the waiting room so I can  
13 get -- I mean in the auditorium so I can get some  
14 more information, and I took him over to the  
15 auditorium, and I came back less than a minute later,  
16 and I couldn't find him.

17 Q Okay. You couldn't find him? Was the  
18 Defendant's program with Colonial House up at that  
19 point?

20 A No, it was not.

21 Q Do you know how many weeks were left on  
22 his program?

23 A Two, I think. I'm not positive.

24 Q Did he ever return to Colonial House after  
25 that?



1 A No, he did not.

2 Q You testified at a preliminary hearing as  
3 well, is that correct?

4 A That's true.

5 Q For this matter. Prior to that time had  
6 you seen the Defendant at all?

7 A Prior to what time?

8 Q The time of the preliminary hearing. Did  
9 he ever --

10 A No, no, no.

11 Q Did he voluntarily returned to the  
12 Colonial House?

13 A No, he did not.

14 Q And when you sat him down, what exactly  
15 did you say to him?

16 A I said there has been some accusations  
17 made against you, and I would like you to wait in the  
18 auditorium until I can get some more information.

19 Q Did he have any response to that when you  
20 said that to him?

21 A I think he just said, Okay, and we got up,  
22 walked over, and I left him, and I think that's all  
23 he did say was, Okay.

24 Q Sir, do you remember talking to the  
25 detective here when he interviewed you after this

1 occurrence?

2 A Vaguely. Lot going on.

3 Q Do you recall saying to the detective that  
4 when you made that statement to the Defendant, he  
5 responded, She's been acting crazy all day long?

6 A Yes, that's true. I had forgotten about  
7 that.

8 Q Would you describe that, please, for the  
9 jury?

10 A That's the essence of it. He said, She's  
11 been acting crazy all day long.

12 Q Did you say anything in response to that  
13 statement by The defendant?

14 A I don't think I did.

15 Q Do you recall telling the detectives --

16 \* \* \*

17 MR. MACVEIGH: Well, Your Honor --

18 THE COURT: Objection sustained.

19 MR. MACVEIGH: Thank you. That  
20 doesn't mean you can't use it. Just means it's not  
21 the proper way to present it.

22 MR. KELLEY: Okay.

23 THE COURT: You can't impeach your own  
24 witness.

25 MR. KELLEY: I'm not. I'm trying to

1 refresh his memory.

2 THE COURT: Well, then the proper way  
3 to do that is to show the statement to the witness,  
4 refresh his memory, and allow him to testify if he  
5 can recall it.

6 MR. KELLEY: Okay. Thank you, Your  
7 Honor.

8 \* \* \*

9 BY MR. KELLEY:

10 Q Would you take a look at -- mark that for  
11 you. If you could read the highlighted portion  
12 there, does that refresh your memory at all?

13 A Yes.

14 Q Okay. Could you read that statements,  
15 please.

16 \* \* \*

17 MR. MACVEIGH: Well, which one is it?

18 THE COURT: I don't know.

19 MR. MACVEIGH: Judge, my objection is  
20 if it refreshes his memory, then he can tell us what  
21 his memory is; and if it's not, then he can't.

22 THE COURT: Your objection is  
23 sustained.

24 \* \* \*

25 BY MR. KELLEY:

1 Q Could you testify from your memory about  
2 that statement?

3 A Yes, we -- when I said there's been an  
4 accusation, he said, She's been crazy all day, and  
5 that's when I did make the statement, I didn't even  
6 tell you who it was.

7 MR. KELLEY: Thank you, sir. Nothing  
8 further at this time, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. MACVEIGH:

11 Q Mr. Lipscomb, at that time you had already  
12 told him that a female client had said that he had  
13 raped her, is that correct?

14 A I said there has been an accusation made  
15 against you.

16 Q Yeah, an accusation made against you?

17 A Right.

18 Q An accusation serious -- let me show you a  
19 little bit more of the report made by Detective  
20 Snell, and I'm going to read from it. He stated that  
21 he told Calvin, this is referring to you, that a  
22 female client made -- I'm sorry, himself and manager  
23 Al Heagy confronted Calvin. He stated that he told  
24 Calvin that a female client made a serious accusation  
25 against him, and that this client claimed that he had

1 raped her. Mr. Lipscomb stated that Calvin  
2 immediately stated that, she's been accounting crazy  
3 all day long. So at that point is that so far  
4 correct? Is that what you told Detective Snell?

5 A If he's got it, counsel, there it's a long  
6 time. If that's what I said, I said it.

7 Q It's a year ago. Fine.

8 A Yeah.

9 Q Do you know whether at the time Calvin  
10 said, She's been acting crazy all day long, you or  
11 your manager Al Heagy had already told Calvin that a  
12 female client there had accused him of raping her?

13 A I don't know if we had already said that.

14 MR. MACVEIGH: Okay. That's all.

15 THE COURT: You may step down.

16 MR. KELLEY: Your Honor, point of  
17 redirect, sir.

18 REDIRECT EXAMINATION

19 BY MR. KELLEY:

20 Q Sir, you never told the Defendant who had  
21 made the accusation against him?

22 A No.

23 Q When you said to the Defendant, Someone  
24 has made an accusation, what did he say in response?  
25 When you said to the Defendant, Someone has made an

1 accusation against you that you raped them, what did  
2 he say in response to that?

3 A All right. I never said to him someone  
4 made an accusation that you raped them. I said  
5 someone made a serious accusation against you, and  
6 then he said, She's been acting crazy all day.

7 Q She's been acting crazy all day. At that  
8 point you had never named anyone, had you?

9 A No, I had not.

10 MR. KELLEY: Thank you. No further  
11 questions.

12 RECROSS EXAMINATION

13 BY MR. MACVEIGH:

14 Q Well, do you recall approximately how long  
15 after this event that you were interviewed by  
16 Detective Snell?

17 A No, I don't.

18 Q Do you think that it was fairly soon  
19 thereafter?

20 A I have no idea.

21 MR. MACVEIGH: Okay.

22 THE COURT: You may step down.

23 I believe there were certain  
24 stipulations that you had indicated could be put in  
25 the record. Maybe this would be an appropriate time

1 to put them on the record.

2 MR. KELLEY: Yes, Your Honor. Your  
3 Honor, the Defendant through counsel will stipulate  
4 that a rape kit was done on the victim, and that that  
5 rape kit produced evidence of semen on the clothing  
6 that the victim alleges she wore when she was raped  
7 as well as the clothing she put on after she took the  
8 shower, and there's a stipulation that that, in fact,  
9 is the Defendant's spermatazoa and the stains are  
10 from the Defendant.

11 THE COURT: Okay. Perhaps you can  
12 modify the stipulation unless the jury understands,  
13 No. 1, what a rape kit is. Perhaps you ought to  
14 explain that. And you gave the fact of the test  
15 results, but you haven't indicated the tests were  
16 part of that rape kit. So clarify it a bit.

17 MR. KELLEY: Folks, the Defendant is  
18 willing to stipulate that there was evidence  
19 collected by a doctor from within the victim, that  
20 being some residual sperm. Also that there was  
21 spermatazoa stains on her clothing, within her  
22 clothing that she wore when the rape was alleged to  
23 have occurred. She also put on clothing after that  
24 after she took the shower, and there were stains on  
25 that that had spermatazoa on them. The Defendant is

1 agreeing that the sperm in both those, from within  
2 the victim as well as on the articles of clothing,  
3 were his sperm, it was his sperm.

4 THE COURT: Your indicating that there  
5 were laboratory tests of those items of clothing?

6 MR. KELLEY: Yes.

7 THE COURT: Seminal stains were found?

8 MR. KELLEY: Um-hum.

9 THE COURT: And that tests were made  
10 to determine whether they matched that of the  
11 Defendant, and that they, in fact, did match?

12 MR. KELLEY: Yes, Your Honor. And we  
13 have a lab report, and he's stipulating to that lab  
14 report that came back having his sperm on them.

15 THE COURT: Is that a correct  
16 stipulation, Mr. MacVeigh.

17 MR. MACVEIGH: As submitted by the  
18 Court, yes, it is.

19 THE COURT: All right. Ladies and  
20 gentlemen, you'll take that as evidence in the case  
21 just as the other evidence by witnesses on the stand  
22 that give testimony. What we are saying both sides  
23 agree that is what the doctor would say. Doctors are  
24 busy people. Instead of calling him and have him  
25 come in and give it, they agree he would come in and



1 say it and that is correct information, and you may  
2 consider that along with the other evidence in the  
3 case. Okay. Any further stipulations? I believe  
4 that covered everything.

5 MR. MACVEIGH: I think so.

6 THE COURT: All right. We are going  
7 to stop at this point, ladies and gentlemen.  
8 Normally we proceed till 4:30, but I have some other  
9 matters which will not permit me to do that today.  
10 So we are going to stop.

11 We'll resume tomorrow morning at 9:30.  
12 You should report to the jury room across the hall  
13 here. I believe you may have been in there earlier  
14 today, and try and be here by 9:15. Hopefully we'll  
15 get started right at 9:30, and we'll bring you over.  
16 Every now and then I have other proceedings I have to  
17 attend to, but we'll start as soon as possible.

18 Please keep in mind that you should  
19 not make up your mind as to the verdict in the case  
20 until the very end. Obviously you have heard only  
21 Commonwealth testimony, but you should keep an open  
22 mind about the case until you've heard all the  
23 testimony, closing arguments from counsel, and  
24 instructions from the Court as to the law that you  
25 will apply in this matter.

1           Also keep in mind that you should make  
2           your verdict from only evidence that was presented  
3           here in the courtroom supervised by the Court and  
4           counsel. So, for example, if you were to hear  
5           something about this case on the radio or T.V, a news  
6           report, for example, or if there is a newspaper  
7           article sometime tomorrow, you should avoid that,  
8           turn the radio off, don't read the paper, whatever so  
9           that you do not receive any improper information.

10           Nor should you contact anybody  
11           involved in the case, have discussions with them, and  
12           try to find things out. You should not talk to  
13           counsel. You should not talk to the police officers,  
14           to the witnesses, to the Defendant, to anybody. Get  
15           your information here solely in the courtroom.

16           With those cautions, you are now  
17           dismissed until tomorrow morning.

18                           \* \* \*

19                           (Whereupon, Court was adjourned.)

20                           \* \* \*

21

22

23

24

25

1 (PROCEEDINGS HELD ON WEDNESDAY, JULY 21, 1993)

2  
3 THE COURT: My apologies for the late  
4 start, ladies and gentlemen. I have a civil matter  
5 which we are going to trial in two weeks involving  
6 several doctors, and the only time I could meet with  
7 them was this morning at 9 o'clock. I thought I'd be  
8 finished by 9:30. Don't blame people involved with  
9 this trial. They had nothing to do with it. You may  
10 proceed.

11 MR. KELLEY: Thank you, Your Honor.  
12 Your Honor, the Commonwealth calls Mr. George Chacona  
13 to the stand.

14 \* \* \*

15 GEORGE S. CHACONA,  
16 called as a witness, having been duly sworn according  
17 to law, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. KELLEY:

20 Q Mr. Chacona, your full name for the  
21 record, please?

22 A George S. Chacona.

23 Q What city do you live in, sir?

24 A Syracuse, New York.

25 Q I'm going to refer you to the date May

1 25th, 1992, and ask you what city you lived in on  
2 that date?

3 A York, Pennsylvania.

4 Q And specifically where were you staying at  
5 that time?

6 A At the Colonial House on Market Street.

7 Q What was the reason of your stay there?

8 A Alcohol rehab.

9 Q You know Janet Hlafka, is that correct, or  
10 you knew her as Janet Velte, is that correct?

11 A Correct.

12 Q Was she a patient there at the time you  
13 were there?

14 A Yes, she was.

15 Q Were you friends with her?

16 A Yes, I was.

17 Q Would you consider yourself close friends?

18 A Yes.

19 Q Do you know the Defendant as well?

20 A Yes.

21 Q He was also staying there while you were  
22 staying there?

23 A Correct.

24 Q Referring to that date again, the 25th of  
25 May, 1992, approximately between say seven and nine

1 did you have occasion to see Janet?

2 A Yes, I did.

3 Q And do you remember or recall specifically  
4 what time it was?

5 A It was approximately 7:30, quarter of 8 in  
6 the dining room.

7 Q Do you recall how she appeared at that  
8 time?

9 A Her hair was soaked wet, and she was  
10 shaking. She was trembling. She was not in good  
11 condition at all.

12 Q Seeing Janet, did you do anything? Did  
13 you approach her or talk to her?

14 A Yes, I did.

15 Q What happened after you approached her?

16 A She wouldn't relate anything to me, and I  
17 just kept talking to her and saying, Well, let's --  
18 we went outside. Actually I said, Let's get out of  
19 here, and we'll go outside, get some fresh air, and  
20 we just -- I just stayed with her cause I didn't feel  
21 that she should have been alone at that time whatever  
22 had happened.

23 Q So you went outside with Janet. Did you  
24 ask her what had made her upset?

25 A Repeatedly.

1 Q Okay. Did she answer you ultimately?

2 A No, she didn't. Ultimately she did, yes.

3 Q Okay. You say you repeatedly asked her?

4 A This took quite a while, half hour, 45  
5 minutes until she answered. I actually had to say,  
6 Did someone hurt you? I asked a question first, Are  
7 you pregnant? She said, No.

8 Well, what's wrong? She said, I'm --  
9 she didn't respond. I said did anyone hurt you? She  
10 finally said, Yes, to that.

11 Q All right. What did you ask her, if  
12 anything?

13 A I asked her again, How did they hurt her?  
14 And she blurted out the word, Rape.

15 Q Did you ask her who, in fact, had raped  
16 her?

17 A Yes, I mentioned several clients' names at  
18 Colonial House, and when I mentioned Calvin's name,  
19 she said it was Calvin.

20 Q Did you ask her whether she was afraid?

21 A I didn't have to ask her because she at  
22 that point started fearing saying that he was going  
23 to kill her. She was afraid for her life. He would  
24 stalk her down, find her wherever she was if she told  
25 anyone, and I was not to tell anyone that she had

1       confided this in me, and she was deathly afraid. I  
2       mean she was trembling, you know. Her body was just  
3       in tremors.

4               Q       From the point you first saw Janet till  
5       the time she made these statements to you, how much  
6       time had elapsed?

7               A       Forty-five minutes to an hour.

8               Q       After hearing these statements, what did  
9       you do?

10              A       We sat there. I thought it would be good  
11      to get staff involved, and she was very, very  
12      reluctant about that, and that took about another 20  
13      minutes to convince her to go inside and get staff  
14      involved.

15              Q       Did you ever take her to an office?

16              A       Yes, I did.

17              Q       And whose office was that?

18              A       Lynn Spores, the night manager.

19              Q       And did she at all relate what had  
20      happened to her to that manager?

21              A       Again that took a tremendous amount of  
22      time, but she finally did. That took another half  
23      hour, 45 minutes of sitting there and talking to her  
24      and having it come out. She kept repeating, I can't  
25      say because he's going to kill me. He's going to

1 kill me. He's going to kill me. That's what she  
2 related the most.

3 Q What, if anything, happened after you  
4 spoke to the night manager?

5 A After the night manager, he called Marvin  
6 and Al. They came down, and they talked to her.

7 Q By Marvin you mean Mr. Lipscomb?

8 A Mr. Lipscomb, yes.

9 Q And they talked to her?

10 A And they talked to her, and it was decided  
11 that she go to the hospital at that time. I think  
12 the other clients came back from the A.A. meeting.  
13 It was not a mandatory A.A. meeting so not all people  
14 went. That's why there was still people at the  
15 house.

16 Q Did you take her to the hospital?

17 A Yes, I did.

18 Q You specifically?

19 A I specifically took her because at that  
20 point she wasn't trusting anyone. She wouldn't talk  
21 to anyone or trust anybody that was there, and it was  
22 a house rule that no one -- a male and a female could  
23 not be together in a car or spend specific time, but  
24 they broke that rule and allowed me to take her to  
25 the hospital.



1 Q Prior to going to the hospital did you  
2 ever go up to her room?

3 A Yes, we went up to her room to -- she  
4 wanted to take clothes with her, and we went up to  
5 her room, and she would not enter her room. She got  
6 within three or four feet of the door, and she  
7 stopped, and she wouldn't go in. Lynn Spoor was with  
8 me, the night manager, because we weren't allowed to  
9 go into another client's room, and she told us where  
10 the clothes was and --

11 Q The clothes. What do you mean by the  
12 clothes?

13 A The clothes that she had on when this rape  
14 occurred.

15 Q Okay. Did she actually point them out?

16 A Yes, they were in a bag in her closet.

17 Q Did she say anything when she pointed them  
18 out to you?

19 A She wanted to burn them.

20 Q Did you actually grab those clothes?

21 A Yes, I did.

22 Q What did you do with them?

23 A I took them to the hospital with me.

24 Q Did you give them to anyone that night?

25 A I gave them to a police officer.

1 Q Do you see anyone in the room right now  
2 the person you gave them to?

3 A Yes, over there.

4 Q Would that be Officer Ankrum over here?

5 A Yes.

6 Q You took her to the hospital, and how did  
7 she appear when she arrived at the hospital?

8 A She was still hysterical and shaken.

9 Q Sir, I want to show you Defendant's  
10 Exhibit 1 and ask you if you recognize the people  
11 portrayed in that photograph?

12 A Yes, that's Calvin and Janet.

13 Q Okay. Regarding the Colonial House, were  
14 there a lot of hugs in the Colonial House?

15 A Lots of hugs at Colonial House.

16 Q At your A.A. meetings were there a lot of  
17 hugs?

18 A Not necessarily at the A.A. meetings, but  
19 at the Colonial House it was. They promoted it.

20 Q Did you ever hug Janet while you were  
21 there?

22 A Much.

23 Q How much?

24 A Depending on a given situation, how bad  
25 she was feeling or how good she was feeling, could

1 have been five times, ten times in an hour, you know,  
2 depending on the situation.

3 Q Did you ever -- were any photographs ever  
4 taken of you hugging other people?

5 A Yes.

6 Q Was that something that occurred quite  
7 frequently?

8 A Yes. And I need to say men hug men too  
9 there.

10 Q There's certainly nothing wrong with that.

11 Sir, were you ever able to observe  
12 Janet and the Defendant interacting together?

13 A I saw them talking, smoking a cigarette  
14 together outside because we were not allowed to smoke  
15 inside.

16 Q Would you have considered them close?

17 A No.

18 Q Were you close with Janet?

19 A Yes, I was.

20 MR. KELLEY: Nothing further at this  
21 time, Your Honor.

22 THE COURT: You may cross-examine.

23 CROSS EXAMINATION

24 BY MR. MACVEIGH:

25 Q Was she close with very many people?

1           A       I think she was close with Kenny, and she  
2 was also close with Maureen.

3           Q       You were there at about the same -- for  
4 the same duration as she was?

5           A       I was there prior to her getting there.

6           Q       When did you arrive there roughly

7           A       April, late March.

8                   MR. MACVEIGH: That's all.

9                   THE COURT: You may step down.

10                  MR. KELLEY: Your Honor, the  
11 Commonwealth calls officer Ankrum to the stand.

12                               \* \* \*

13                               JAMES D. ANKRUM,

14 called as a witness, having been duly sworn according  
15 to law, testified as follows:

16                               DIRECT EXAMINATION

17           BY MR. KELLEY:

18           Q       Officer Ankrum, your full name, please,  
19 for the record?

20           A       James D. Ankrum.

21           Q       What is your occupation?

22           A       Police officer with West Manchester  
23 Township.

24           Q       And, sir, how long have you been so  
25 employed?

1 A Since January of '80.

2 Q Were you involved in the investigation of  
3 this --

4 A Yes, I was.

5 Q -- allegation. And referring to May 25th,  
6 1992, did you respond to the hospital?

7 A Yes, I did.

8 Q Okay. What hospital was that?

9 A York Hospital.

10 Q Okay. And did you have occasion to meet  
11 with the victim in this matter, Janet Velte?

12 A Yes, I did.

13 Q Okay. Could you describe for the jury,  
14 please, her demeanor when you met with her?

15 A When I responded to the hospital, I first  
16 met with Mr. Chacona who advised me of the situation,  
17 and I then went into the room where she was being  
18 treated, and obviously it was a touchy situation. So  
19 I sat down, told her who I was, and that I had to ask  
20 her certain questions, and that we could take all the  
21 time that was necessary.

22 I tried to slowly get into talking to  
23 her about generalities and then work to the  
24 specifics, but there was just -- she wouldn't respond  
25 to anything. I was able to get her name, which I

1 could barely understand. When I tried to get to the  
2 specifics of the incident, she just repeated several  
3 times, He'll kill me.

4 So with that I went back out into the  
5 hallway and talked with Mr. Chacona again, and he  
6 told me that he had more of a rapport with her. So I  
7 took him into the room with me, but again she just  
8 wouldn't discuss it at all.

9 Q Physically how did she appear, if you  
10 could describe that?

11 A A basket case. She was sitting there with  
12 her head hanging down, hair a mess. She was just  
13 shaking terrible.

14 Q Was there a rape kit done on the victim?

15 A That was done, I believe, at a later time.  
16 I contacted Detective Snell, and then shortly -- I  
17 was informed by the hospital that one would be done,  
18 and in speaking with Detective Snell. Then after I  
19 could not obtain any information from her concerning  
20 the specifics, I obtained further information from  
21 Mr. Chacona, and then I left.

22 Q Okay. Specifically, one moment -- strike  
23 that.

24 Sir, did you receive any evidence from  
25 Mr. Chacona when you were there at the hospital?

1           A       Yes, I did. It was a white plastic  
2       garbage bag type bag with the top tied in a knot, and  
3       he informed me that those were the clothes that she  
4       had said she had on when the incident took place.

5           Q       Did you review the contents of that bag?

6           A       No, I didn't.

7           Q       You didn't?

8           A       I kept it as it was with the knot tied in  
9       the top.

10          Q       What did you do with that?

11          A       When I returned to the office, I entered  
12       it into the evidence locker, filling out a property  
13       sheet and entering it.

14          Q       Okay. And that was ultimately sent up to  
15       the Pennsylvania State Police, is that correct, for  
16       analysis?

17          A       Yes, as far as I know.

18                   MR. KELLEY: The results of which  
19       would be the stipulation, Your Honor. Nothing  
20       further at this time.

21                   MR. MACVEIGH: I have no questions.

22                   THE COURT: You may step down.

23                   MR. MACVEIGH: Your Honor, I have no  
24       objection to this witness or any of the other  
25       Commonwealth witnesses being excused if they wish to

1 leave.

2 THE COURT: Very well.

3 \* \* \*

4 (Whereupon, Commonwealth Exhibits No.  
5 1 and 2 were produced and marked for identification.)

6 \* \* \*

7 MR. KELLEY: One moment, Your Honor.  
8 Your Honor, I reviewed Commonwealth Exhibit 1 and 2,  
9 those being the results of the analysis of fluids on  
10 the victim, and the Defendant has no objection in  
11 that he's conceding that his sperm was found on and  
12 about the victim, of having these entered into  
13 evidence without having actually laid a foundation  
14 for them.

15 THE COURT: Very well.

16 MR. KELLEY: With that, Your Honor,  
17 the Commonwealth would rest.

18 THE COURT: Ready to proceed with the  
19 defense?

20 MR. MACVEIGH: Your Honor, if I could  
21 have a brief recess?

22 THE COURT: I assume you're moving for  
23 the admission of the various exhibits?

24 MR. KELLEY: Yes, Your Honor.

25 THE COURT: Any objection?



1 MR. MACVEIGH: No, no objection.

2 THE COURT: They may be admitted.

3 MR. MACVEIGH: Five minutes. I'd like  
4 to have five minutes, please.

5 THE COURT: All right. If you'll go  
6 out to the jury room, we'll bring you back in as soon  
7 as we are ready.

8 \* \* \*

9 (Whereupon, a recess was taken.)

10 \* \* \*

11 MR. MACVEIGH: Your Honor, defense  
12 calls Detective Snell.

13 \* \* \*

14 Jeffrey S. Snell,  
15 called as a witness, having been duly sworn according  
16 to law, testified as follows:

17 DIRECT EXAMINATION

18 BY MR. MACVEIGH:

19 Q Detective, you are the arresting officer  
20 in the case?

21 A Yes, I was.

22 Q You've been employed by West Manchester  
23 Township Police for how long, sir?

24 A Fourteen years.

25 Q Employed by any other police departments?

1 A No, sir.

2 Q How long have you been a detective?

3 A Seven years.

4 Q Detective, you took extensive reports from  
5 several witnesses in this case, is that correct, sir?

6 A Yes, I did.

7 Q And you have a copy of the report that you  
8 made in this case prior to obtaining the arrest  
9 warrant for Calvin Roth, correct?

10 A That's correct.

11 Q Would you direct your attention to the  
12 page that has looks like what I have is a copy of  
13 Page 9 and a fax phone number at the top, and it's  
14 the paragraph entitled, Interview with Marvin  
15 Lipscomb, probably couple of misspellings in there.

16 You were present yesterday during the  
17 testimony of Mr. Lipscomb, correct?

18 A Yes, I was.

19 Q Do you recall my cross-examination of Mr.  
20 Lipscomb?

21 A Yes, I do.

22 Q There was some question about whether or  
23 not Mr. Lipscomb told Mr. Roth when he confronted him  
24 whether or not he had told Mr. Roth in advance that a  
25 female client had accused Mr. Roth of rape?

1 A That's correct. I recall that.

2 Q When you take down a report, particularly  
3 in a serious allegation such as this, do you go to  
4 pains to record it as accurately as you can from any  
5 witness?

6 A I try the best I can, yes.

7 Q Do you believe that your report in this  
8 case is accurate?

9 A I have no reason not to believe it's not  
10 accurate.

11 Q Okay. Would you read to the jury your --  
12 did you prepare this report yourself?

13 A Yes, I did.

14 Q Type it or dictate it?

15 A I dictate it.

16 Q Would you read down about the seventh or  
17 eighth line where the sentence begins with the word  
18 subsequently?

19 A Yes, Subsequently he stated that --

20 Q Perhaps we should clarify about whom  
21 you're reporting at this point?

22 A Okay. This is an interview with Marvin  
23 Lipscomb, the director of the Colonial House. The  
24 date of the interview was May 26, 1992.

25 Q That would have been one day after the

1 incident?

2 A That's correct, sir.

3 Q Thank you.

4 A Subsequently he stated that himself and a  
5 manager, Al Heagy, confronted Calvin on this  
6 incident. He stated that he told Calvin that a  
7 female client made a serious accusation against him,  
8 and this client claimed that he had raped her.

9 Q Okay. That's all.

10 And you believe that that report which  
11 was made how soon after your interview with Mr.  
12 Lipscomb?

13 A Almost immediately I dictate it to my  
14 secretary.

15 Q Okay. And you believe that that's what  
16 Mr. Lipscomb told you at the time?

17 A That's what my report reflects.

18 MR. MACVEIGH: Thank you. That's all.

19 CROSS EXAMINATION

20 BY MR. KELLEY:

21 Q Detective, could you read -- could you  
22 continue on from where you left off for Attorney  
23 MacVeigh's question?

24 A Yes, I can. Mr. Lipscomb stated that  
25 Calvin immediately stated that, She's been acting

1 crazy all day long, which Mr. Lipscomb stated that he  
2 replied by saying, Calvin, we didn't even tell you  
3 who it was. Mr. Lipscomb went on to state that  
4 Calvin's response was, Someone told me Janet flipped  
5 out so I assumed it was her.

6 MR. KELLEY: Thank you very much,  
7 Detective.

8 REDIRECT EXAMINATION

9 BY MR. MACVEIGH:

10 Q Detective, wouldn't it make sense that it  
11 would be a female who would make an allegation of  
12 rape as opposed to a male?

13 A Yes.

14 MR. MACVEIGH: That's all.

15 THE COURT: You may step down.

16 MR. MACVEIGH: Okay.

17 \* \* \*

18 CALVIN W. ROTE, JR.,  
19 called as a witness, having been duly sworn according  
20 to law, testified as follows:

21 DIRECT EXAMINATION

22 BY MR. MACVEIGH:

23 Q Tell the Judge and members of the jury  
24 your name, please.

25 A Calvin W. Roth, Jr.

1 Q Mr. Roth, how old are you?

2 A Thirty.

3 Q Mr. Roth, in Adams County court have you  
4 been convicted of forgery and theft and receiving?

5 A Yes, I have.

6 Q Okay. How long ago was that?

7 A It's been over -- I was convicted on that  
8 it's been about a year, year and a half now, two  
9 years.

10 Q Okay. You were sentenced on that offense?

11 A Yes, I was.

12 Q Okay. Calvin, you've heard the testimony  
13 of Janet Velte, and you know Miss Velte?

14 A Yes, I do.

15 Q You knew her from the Colonial House?

16 A Yes, I did.

17 Q Tell us about what your relationship with  
18 her was like prior to May the 25th?

19 A Well, it was just like any other day. I  
20 mean usually she comes downstairs same as everybody  
21 else for breakfast. We had our meetings, group  
22 meetings cause we had sessions where everybody got  
23 together and said a prayer for everybody and, you  
24 know, talked and said good morning to everybody and  
25 hugged each other. It was a lot of hugging.

1                   And prior to that day I mean it was  
2                   like any other day, you know, but I mean Janet --  
3                   Janet flips out -- flipped out a lot, you know, and  
4                   when she first got there, we did a lot of talking,  
5                   you know, and I mean I was told already --

6                   Q       When you say we did a lot of talking, are  
7                   you referring to the two of you or are you referring  
8                   to the residents as a group?

9                   A       No, I'm referring to me. I'm referring to  
10                  George, Christian, Bill, Walter back there, all of  
11                  us.

12                  Q       Were you -- how would you describe your  
13                  relationship with Janet Velte as opposed to your  
14                  relationship with other residents of Colonial House?

15                  A       I got along with everybody there, even  
16                  her. I mean when she first got there, I mean she  
17                  didn't seem like she didn't want to be close to  
18                  anybody, nobody when she first got there. I mean she  
19                  didn't -- she just didn't want to be there. I mean  
20                  she told that to a lot of people she didn't want to  
21                  be there.

22                               She'd flip out, run off somewhere, you  
23                               know, wouldn't do what people told her to do. So  
24                               she'd just go hide somewhere. So the relationship  
25                               with me and her -- I mean afterwards, after all -- I

1 mean we actually started talking, you know, me and  
2 her got closer than anybody in the rehab. I mean I  
3 was closer to her than anybody.

4 Q How long have you been at the rehab?

5 A I was there -- I was there -- I had 17  
6 days to go till the program was finished. I was  
7 there about, I guess, two months and a half, almost  
8 three months.

9 Q What were the rules that you were aware of  
10 concerning contact that clients were allowed to have  
11 with members of the opposite sex?

12 A We was allowed to talk to them, you know,  
13 and hug them in a meeting, but we wasn't allowed to  
14 actually be alone with them or we wasn't allowed to  
15 have no kind of relationship with a woman in the  
16 program because the rules if you're there for 90  
17 days, your suppose to be there, not the -- no  
18 relationship with a women after you leave the  
19 program, even while your there. We are not allowed  
20 the have no sex, nothing like that.

21 Q Okay. Directing your attention then to  
22 the evening in question -- oh, let me back up a  
23 minute. I'm going to show you what's already been  
24 marked as Defense Exhibit 1. Can you identify that?

25 A Yes, that's me and Janet.



1 Q It's a photograph of you and Janet?

2 A Yes.

3 Q Do you now who took that photograph?

4 A Yes, Walter Gladstone.

5 Q You've heard Janet testify that you had  
6 intercourse with her, is that correct?

7 A Yes, it is.

8 Q You did, in fact, have intercourse with  
9 her?

10 A Yes, I did.

11 Q You've heard her testify that you  
12 threatened to kill her?

13 A I never said nothing like that to her.

14 Q Did you hold your hand over her mouth?

15 A No, I did not.

16 Q Pin her arms?

17 A I mean if you look at the picture, I mean,  
18 at that time --

19 Q Answer my question.

20 A No, I didn't.

21 Q Did you put your knee in her gut?

22 A No, I did not.

23 Q Ever threaten to get her?

24 A No, I did not.

25 Q Ever put your hands on her shoulders and

1 pin her down?

2 A No, I did not.

3 Q Did you, in fact, have intercourse with  
4 her?

5 A Yes, I did by her own consent.

6 Q Tell us about that?

7 A I mean -- I mean could you rephrase the  
8 question beyond what part?

9 Q First of all, where did it take place?

10 A It took place upstairs in the hall -- I  
11 mean second room going down -- first room going down  
12 in the girls section of the hallway.

13 Q Do you know whether that was her room?

14 A Yes, it was her room.

15 Q Were you breaking a house rule by going  
16 there?

17 A Yes, I was.

18 Q You were also breaking a house rule by  
19 having intercourse with her, is that correct?

20 A Yes, I was.

21 Q You would have been discharged according  
22 to the rules if you had been found out for that, is  
23 that correct?

24 A Yes.

25 Q You admit, do you not, then leaving after

1 Mr. Lipscomb told to you stay, is that correct?

2 A Yes, I did leave.

3 Q That was for breaking the house rules?

4 A Yeah, that was for breaking the house  
5 rules.

6 Q Okay. Approximately how long did the  
7 intercourse last?

8 A About maybe 15 to a half an hour.

9 Q Fifteen minutes?

10 A To about half an hour, yes.

11 Q After that, what did you do?

12 A After the intercourse was over, she stood  
13 up. I stood up. She put her pants back on. She  
14 pulled her pants up from her ankles because she had  
15 cowboy boots on, weren't real long cowboy boots, and  
16 she just pulled her pants back up.

17 Then after it was all over, I turned  
18 around and said, You have to check out the hallway,  
19 make sure there ain't nobody seeing. She went over,  
20 looked out the hallway. She said, Go ahead. She  
21 kissed me, and I snuck out of the room, went to my  
22 room.

23 Q Okay. Now, when was it that you had  
24 learned that she had claimed you had raped her?

25 A I come back from the A.A. meeting. That's

1 when I found out after I was in the hallway. After  
2 we found out that she flipped out, Marvin Lipscomb  
3 come out of the office, and first thing I said to him  
4 said is, How's Janet? Is she okay?

5 Q How had you heard she had flipped out?

6 A On the way back we seen Marvin's car  
7 sitting there, and it's unusual for Marvin's car to  
8 be there. And they said -- well, the driver of the  
9 van, the driver, that's what they call him, that  
10 brought us back and forth from the A.A. meeting said  
11 Janet flipped out.

12 Q You had been in a van with other people to  
13 an A.A. meeting that evening?

14 A Yes.

15 Q Then returned?

16 A Yes.

17 MR. MACVEIGH: That's all. Your  
18 witness.

19 CROSS EXAMINATION

20 BY MR. KELLEY:

21 Q Mr. Roth, knowing that fraternization  
22 between yourself and Janet was against the rules, you  
23 went to her room and had intercourse with her, is  
24 that correct?

25 A Yes, on her own consent.

1 Q Under her own consent?

2 A Yes.

3 Q You did so, and she never took her pants  
4 off nor did she ever take her boots off, is that  
5 correct?

6 A I didn't even take mine off.

7 Q When you left her, she actually acted as a  
8 lookout for you to get out of the room, is that  
9 correct?

10 A Yes, she did.

11 Q When approached by Mr. Lipscomb, he said  
12 there was a serious allegation made against you, and  
13 your response to him was --

14 \* \* \*

15 MR. MACVEIGH: Your Honor, I think  
16 that the record at least in question is that there  
17 was an allegation of rape made against him and not  
18 just an allegation that was serious.

19 MR. KELLEY: All right. He said to  
20 you -- I don't think there's any question to that,  
21 Dave. We agree to that.

22 \* \* \*

23 BY MR. KELLEY:

24 Q He said to you, Someone has made an  
25 allegation against you that you raped Janet?

1           A       Mr. Lipscomb stood in the hallway and said  
2 Calvin. I said, Yeah. He said, I want you to come  
3 to my office. He says, exact words he says, There's  
4 been an allegation of you raping one of the clients,  
5 and first thing -- the only person that was there  
6 that flipped out was Janet. So first thing I knew it  
7 had to be Janet.

8           Q       And Mr. Lipscomb said to you, I want you  
9 to stay here. I'll be back to talk to you, is that  
10 correct?

11          A       No.

12          Q       What did he say?

13          A       That's not correct. He turned around and  
14 took me to his office right after that, right after  
15 he said that to me. We got in the office. He asked  
16 me, he said, Did you have sex with Janet? He did not  
17 say -- he did not say this or that. He just turned  
18 around and said, Did you have sex with Janet, but he  
19 said it in a vulgar way. I'm not going to say it  
20 like that. He said, Did you have blank sex with  
21 Janet, and I said, No. I said, You're crazy. I  
22 don't know what your talking about.

23          Q       Did he at some point during your  
24 discussion leave you in the office?

25          A       No, he did not.

1 Q Okay. At some point did he leave you?

2 A No.

3 Q He stayed with you until today?

4 A No.

5 Q That's what I'm asking you.

6 A Yeah, he left.

7 Q Okay. And you left Colonial House after  
8 he left, is that correct?

9 A Yes.

10 Q And you went to Indiana, is that correct?

11 A Yes.

12 Q And you left at Colonial House all your  
13 clothing, is that correct?

14 A Yes.

15 Q You left a check, a welfare check of yours  
16 at Colonial House, is that also correct?

17 A Well --

18 Q You didn't take anything with you?

19 A No, I didn't take nothing with me.

20 Q You just left and went to Indiana, is that  
21 correct?

22 A Yes.

23 Q Okay. You say -- Attorney MacVeigh -- and  
24 this is relevant -- Attorney MacVeigh says you've  
25 been convicted of forgery, theft, and receiving

1 stolen property. Is that also true?

2 A Yes, I have.

3 Q You said it's been a year and a half?

4 A It's been about a year, two years now  
5 since I had -- a year's been over with.

6 Q There were actually three separate  
7 offenses. They're not one offense. They happened at  
8 different times, did they not?

9 A Yeah, and they was all put together. I  
10 pleaded guilty to it and did my time.

11 Q You also testified under direct  
12 examination that you were very, very good friends  
13 with Janet?

14 A Yes, I was.

15 Q You were friends with pretty much  
16 everyone?

17 A Yeah, there was two people in the Colonial  
18 House I was closer with than anybody. That was  
19 Walter Gladstone and Janet.

20 MR. KELLEY: Nothing further, Your  
21 Honor, at this time.

22 MR. MACVEIGH: No redirect.

23 THE COURT: You may step down.

24 MR. MACVEIGH: Mr. Gladstone.

25

\* \* \*



1                                   WALTER D. GLADSTONE,  
2       called as a witness, having been duly sworn according  
3       to law, testified as follows:

4                                   DIRECT EXAMINATION

5       BY MR. MACVEIGH:

6                   Q       Mr. Gladstone, tell us your name and age,  
7       please?

8                   A       My name is Walter Donald Gladstone. I'm  
9       21 years old.

10                  Q       Where do you live?

11                  A       I live at 417 West Market Street, York,  
12       Pennsylvania.

13                  Q       Okay. Mr. Gladstone, do you know Janet  
14       Velte? She's now known as Janet Hlafka but had been  
15       Velte?

16                  A       Yes.

17                  Q       And do you know my client, Calvin Roth?

18                  A       Yes, I do.

19                  Q       Do you know both of these individuals from  
20       the Colonial House, correct?

21                  A       That's correct.

22                  Q       Where you were a client last year?

23                  A       Correct.

24                  Q       Last May. Showing you Defense Exhibit 1,  
25       a photograph. Can you tell me what that's a

1 photograph of?

2 A Yeah, that's a photograph of Calvin and  
3 Janet.

4 Q Who took that photograph?

5 A I did.

6 Q Did you later on give that photograph to  
7 Calvin?

8 A Yes, I did.

9 Q Were you there for the entire time that  
10 the other people that were, referring to Calvin and  
11 Janet, there?

12 A Yeah.

13 Q How would you describe the rapport, the  
14 relationship that existed between Calvin and Janet?

15 A They seemed to get along fine, you know.  
16 I didn't get too wrapped up into other people's  
17 business, you know. They used to pair off, go and  
18 talk outside, and I really tried not to get too  
19 involved in anything, you know what I mean.

20 Q You didn't hear their conversation?

21 A I never heard their conversations, no.

22 Q Did it appear to you that their  
23 relationship was closer than say average?

24 A Yeah, I've been through a lot of treatment  
25 for my drug and alcohol abuse, and I've seen a lot of

1 relationships in treatment, and that it's the same  
2 old thing, you know what I mean. A male and female  
3 pairing off and talking, and that's how it starts,  
4 you know. I've seen a lot of that. So that's  
5 just -- I assumed that's what was going on, and I  
6 just stayed out of it, you know.

7 Q Did you see this going on over a longer  
8 period of time than just a day or two?

9 A Yeah.

10 Q Could you estimate how long?

11 A I don't know, week and a half. I'm not  
12 really sure how long it was. That was a long time  
13 ago.

14 MR. MACVEIGH: Okay. That's all.

15 Your witness.

16 CROSS EXAMINATION

17 BY MR. KELLEY:

18 Q Do you know how long Janet was there in  
19 the program?

20 A She came after I was there, and --

21 Q Two weeks be about correct time?

22 A What, that she was there?

23 Q Yeah.

24 A I guess. I'm not really sure.

25 Q Did you ever see her hugging George

1 Chacona?

2 A Sure.

3 Q She hug him a lot?

4 A I really don't know.

5 Q Do you think she and George were closer  
6 than most people would be?

7 A I really don't know. I was close with  
8 George also. I didn't really pay attention too much  
9 to what other people were doing.

10 Q You were very close. Were you as close  
11 with George as Janet was with George?

12 A I really don't know how close Janet was to  
13 George, but I know I was close to George. At least I  
14 think I was.

15 Q Pretty open program, isn't it? You're  
16 asked to kind of unveil the problems from your soul  
17 and talk about your problems a lot?

18 A Um-hum.

19 Q Lots of discussion going on between  
20 people, is that correct?

21 A That's true.

22 Q Lots of hugging going on?

23 A Um-hum.

24 Q Lots of telling of secrets that have been  
25 locked inside the body for a long time, is that

1 correct?

2 A Well, that's suppose to happen, you know.  
3 That doesn't necessarily happen, but that's what they  
4 say.

5 Q During the hours 7 p.m. to 9 p.m. or  
6 around that time on May 25th were you with the  
7 Defendant and Janet?

8 A I was with the Defendant. I was with  
9 Calvin.

10 Q At the A.A. meeting?

11 A Yes.

12 Q Prior to that time were you with the  
13 victim and the Defendant in their room?

14 A No, I wasn't in the room.

15 Q So you can't testify what happened in that  
16 room can you?

17 A No.

18 MR. KELLEY: Thank you very much.

19 MR. MACVEIGH: No redirect.

20 THE COURT: You may step down.

21 MR. MACVEIGH: Your Honor, we'll move  
22 the admission of Defense Exhibit 1 and rest.

23 MR. KELLEY: No problem, Your Honor.

24 THE COURT: It may be admitted.

25 Rebuttal?

1 MR. KELLEY: Your Honor, may we take a  
2 brief recess?

3 THE COURT: I guess since I did it for  
4 the defense.

5 MR. KELLEY: Thank you very much.

6 \* \* \*

7 (Whereupon, a recess was taken.)

8 \* \* \*

9 THE COURT: You may proceed.

10 MR. KELLEY: Your Honor, Commonwealth  
11 calls Don Overmyer for rebuttal.

12 \* \* \*

13 DONALD W. OVERMOYER,  
14 called as a witness, having been duly sworn according  
15 to law, testified as follows:

16 DIRECT EXAMINATION

17 BY MR. KELLEY:

18 Q Mr. Overmoyer, your full name, please.

19 A Donald W. Overmoyer.

20 Q Mr. Overmoyer, do you know the Defendant?

21 A Yes, I do.

22 Q I'm going to refer you to -- wait. Let me  
23 take a second here. Have you talked to the Defendant  
24 at some length in your past?

25 A Yes, I have.

1 Q Have you ever talked to the Defendant on  
2 the telephone?

3 A Yes, I have.

4 Q Okay. Approximately how many times?

5 A Only once that I'm sure of.

6 Q Prior to talking to him on the telephone  
7 had you talked to him in person?

8 A Yes.

9 Q Would you recognize his voice?

10 A Yes, I would.

11 Q Are you sure of that?

12 A Yes.

13 Q Refer you to the 26th, May 26th. Ask you  
14 if you received a phone call with a voice that  
15 sounded like the Defendant?

16 A Yes, I did.

17 Q Did the person who was talking to you  
18 identify himself?

19 A Yes, I believe he did.

20 Q And what was the name he identified  
21 himself by?

22 A As Calvin.

23 Q Okay. Did you recognize the voice as  
24 Calvin's?

25 A I did.

1 Q Did Calvin make any mention during the  
2 course of that conversation of the rape which he was  
3 alleged to have committed?

4 A He didn't mention it by the name of rape,  
5 no.

6 Q Did he mention the incident?

7 A He mentioned an incident.

8 Q Okay. Did he indicate to you whether or  
9 not anyone else had been involved?

10 A He asked me real briefly, Did they find  
11 anything else about the other guy.

12 Q He said the other guy?

13 A The other, generalizing the other person.

14 Q What did you take that to mean?

15 \* \* \*

16 MR. MACVEIGH: We'll object to that.

17 THE COURT: I'll sustain that  
18 objection.

19 \* \* \*

20 BY MR. KELLEY:

21 Q This was the day after the incident on the  
22 25th?

23 A Yeah, it was 11 a.m. on the 26th of May.

24 MR. KELLEY: Your witness.

25 CROSS EXAMINATION



1 BY MR. MACVEIGH:

2 Q Did you make a note in any kind of written  
3 form about that? I mean, how do you know it was 11  
4 o'clock?

5 A I wrote an incident report.

6 \* \* \*

7 MR. MACVEIGH: That's all.

8 THE COURT: You may step down.

9 MR. KELLEY: Your Honor, finally the  
10 Commonwealth would recall George Chacona to the stand  
11 for rebuttal.

12 \* \* \*

13 GEORGE CHACONA,  
14 called as a witness, having been duly sworn according  
15 to law, testified in rebuttal as follows:

16 DIRECT EXAMINATION

17 BY MR. KELLEY:

18 Q Mr. Chacona, do you recall when Janet  
19 Velte arrived at the Colonial House?

20 A Yes, I do.

21 Q Okay. Approximately how long was she  
22 there prior to this incident?

23 A Three, four weeks.

24 Q Referring to her initial stay there the  
25 first days or the first weeks, do you recall whether

1 her relationship was somewhat close to the Defendant?

2 A Her initial stay she was totally withdrawn  
3 from everyone, everyone. She had nothing to do with  
4 anyone except staff.

5 Q Did she establish a friendship with the  
6 Defendant?

7 A No more than with the other clients  
8 involved at Colonial House.

9 Q Would you say she was on friendly terms  
10 with the Defendant?

11 A When they first got together, they were on  
12 friendly terms. After that she told me she was  
13 frightened of him.

14 Q Do you recall if this was before the rape  
15 or after the rape -- the alleged rape?

16 A Before the rape.

17 Q Do you recall how long before it was?

18 A Week, two weeks, three weeks. That's  
19 difficult to do.

20 Q Would you say that their relationship had,  
21 however, changed?

22 A Yes.

23 MR. KELLEY: Thank you.

24 CROSS EXAMINATION

25 BY MR. MACVEIGH:

1 Q Did you report that to anybody?

2 A There was no one to report that to.

3 Q How many staff members are there, Mr.  
4 Chacona?

5 A At nighttime, one.

6 Q How many during the day?

7 A Four or five.

8 Q Several therapists?

9 A Yes.

10 Q Counselors?

11 A Yes.

12 Q And you didn't report that to anybody?

13 A It wasn't my obligation to report that to  
14 anyone.

15 MR. MACVEIGH: Okay.

16 MR. KELLEY: Your Honor, might I ask a  
17 few more questions.

18 THE COURT: Yes.

19 REDIRECT EXAMINATION

20 BY MR. KELLEY:

21 Q Sir, did you ever report to any staff  
22 member a change in two people's relationships?

23 A No, I did not.

24 Q Did your relationship during the course of  
25 your stay there ever change with certain people?

1 A Yes, it did.

2 Q Did you report that to any staff members?

3 A No, I did not.

4 Q Approximately how many females were there  
5 during the course of your stay?

6 A At any given time there was three, four,  
7 sometimes up to five, but they came and went. Some  
8 stayed for a week, some stayed for a day, and they  
9 left.

10 Q Do you recall how many were there at the  
11 time Janet was there?

12 A There were three other females there when  
13 Janet came.

14 MR. KELLEY: Okay. Thank you.

15 MR. MACVEIGH: Nothing else.

16 THE COURT: You may step down.

17 MR. KELLEY: No further witnesses,  
18 Your Honor.

19 THE COURT: Anything further, Mr.  
20 MacVeigh.

21 MR. MACVEIGH: No, Your Honor.

22 THE COURT: Prepared to go to the  
23 jury?

24 MR. MACVEIGH: I am. If the Court  
25 please. Mr. Kelley. Detective Snell. Officer

1 Ankrum. Ladies and gentlemen, when we chose you  
2 yesterday, as I said, sometimes I have a very  
3 difficult decision in the jury selection. Our system  
4 requires us to pull strangers who don't know, don't  
5 know anybody, don't know anything about the case who  
6 will do their level best to listen to both sides of  
7 the story and then make an informed judgment on that,  
8 and so we've chosen the twelve of you to do a job  
9 that I have no doubt will be difficult.

10 My job is just about over, and yours  
11 is just now beginning. It started by paying  
12 attention, but now the hard part comes, and I don't  
13 envy you, the position that you're in.

14 The case here is obviously one in  
15 which emotions run high. With Miss Velte, Mrs.  
16 Hlafka, they were bottled up. With Mr. Roth they  
17 were bottled up. So they are high on both sides.

18 Judge Chronister will tell you, and he  
19 tells you this for very good reason, that my client  
20 is presumed innocent just as any of the twelve of you  
21 would be if you were charged with anything from say a  
22 parking ticket to mass murder. The question here is  
23 whether or not the State -- I tend to say State or  
24 Commonwealth, but it is the same -- whether they've  
25 proven to you beyond a reasonable doubt that Calvin

1 Roth is guilty of the offenses of terroristic threats  
2 and of rape.

3 Judge Chronister will lay out for you  
4 what the elements of those offenses are, what parts  
5 of the checklist the Commonwealth has to prove, and  
6 then you have to consider whether the Commonwealth  
7 has proved those elements, and not only just prove  
8 them, prove them to you beyond a reasonable doubt.

9 In fact, there's a difference between  
10 that you can think about. You may not be able to  
11 quantify, you can't put a ruler on it or put it on a  
12 scale, but you can recognize I trust all being  
13 adults, all being intelligent, all being  
14 understanding, you can recognize a difference between  
15 guilty and not guilty as opposed to guilty and  
16 innocence.

17 Calvin Roth never has to demonstrate  
18 his innocence. The State of Pennsylvania always has  
19 to demonstrate his guilt to you. Until they've done  
20 that, you might not like what he's charged with, you  
21 might not like his appearance, you might not like the  
22 way he looked on the stand, but until they've proven  
23 him guilty beyond a reasonable doubt, he's innocent.

24 If he did this offense, then it's  
25 obviously horrible, but I point out to you that the

1 offense is quite clear. It's quite clear that he had  
2 sexual intercourse. We've admitted that. State's  
3 exhibits over there are the lab reports demonstrating  
4 that his body fluids were found on her clothing. I  
5 believe perhaps taken from her body as well. That's  
6 demonstrated. That's not the issue here.

7 The issue here is clearly consent.  
8 Has the State proven it to you beyond a reasonable  
9 doubt? Well, reasonable doubt. I won't belabor the  
10 issue. If you have a second thought about it, if you  
11 pause a little bit, that's a reasonable doubt. If  
12 you would do in a matter of some serious importance  
13 in your own life, maybe where to send your child to  
14 school, maybe where to move, something of that  
15 nature, if you think about it a second time, that's  
16 pausing, that's hesitating, and even though you think  
17 he's guilty, if he hasn't been proven guilty beyond a  
18 reasonable doubt, then you find him not guilty. That  
19 may be to you somewhat distasteful. That, ladies and  
20 gentlemen, is why I don't envy the position that  
21 you're in.

22 Sometimes there are jobs that must be  
23 done. We don't like to do them. They may, in fact,  
24 hurt us that we may loose sleep over at night.  
25 Nonetheless, sometimes those jobs have to be done.

1           The evidence actually in this case is  
2 not terribly complex. So I won't belabor it. Did my  
3 client leave the facility, and was that against the  
4 facility's rules? Yes and yes. Why did he do it?  
5 The answer is obvious. He was going to be kicked  
6 out. Did he flee to Indiana? Yes. Will Judge  
7 Chronister tell you that flight is evidence of  
8 consciousness of guilt? Yes.

9           Now, ladies and gentlemen, the  
10 critical question. Guilt about what? Well, guilt  
11 about leaving and the consequences -- pardon me,  
12 guilt about having broken the laws and the  
13 consequences that would be incident with that or  
14 guilt because there was an act committed upon this  
15 person.

16           Ladies and gentlemen, we've heard two  
17 sides of this story, and that's where, of course, the  
18 story diverges. That's why I'm glad I'm not in your  
19 shoes because I won't have to make that decision.

20           I sometimes think that the burden that  
21 the criminal justice system imposes on people such as  
22 yourselves having done nothing other than to register  
23 to vote, and then all of a sudden they are called in  
24 to make this terribly important decision, it's  
25 somewhat unfair. Your name happened to be pulled out



1 of the hat. We thought that you would give us a fair  
2 shake. We ask that you be on a jury, and here you  
3 are, and all you did was sign up to vote four years  
4 ago. It doesn't seem right. You're here  
5 nonetheless.

6 There are two different sides to the  
7 story. I've repeated that. I think you know what  
8 issues are here. I won't belabor it. Sure we've got  
9 a picture showing the two of them, I think, with one  
10 arm around the other smiling at the camera, and  
11 there's a discrepancy between whether or not they  
12 were friendly or not friendly, whether or not she was  
13 friendly with other people, he was friendly with  
14 other people. There's a lot of hugging going on  
15 apparently at a facility such as Colonial House.

16 The bottom line, folks, is you've got  
17 a tough choice to make. When you do that, when you  
18 go back and talk among yourselves, take all the time  
19 you'd like. Consider the evidence that you heard,  
20 but Judge Chronister will tell you that fear of an  
21 individual, sympathy for an individual, dislike of an  
22 attorney, of an individual, is not something that you  
23 may consider. It's the question of whether or not  
24 the State has met the very difficult burden it has.

25 The theory, folks, is that it's better

1 that a person arguably guilty go free than an  
2 innocent person be convicted. That's the theory.  
3 Thank you.

4 MR. KELLEY: Your Honor, may it please  
5 the Court. Attorney MacVeigh.

6 MR. MACVEIGH: Attorney Kelley.

7 MR. KELLEY: Ladies and gentlemen,  
8 first of all, in executing your duty as jurors, I  
9 certainly hope that each and every one of you will,  
10 indeed, pause. Pause. Consider all of the evidence  
11 that was presented. If you hesitate, consider more.  
12 Consider all the evidence.

13 A reasonable doubt is not a  
14 hesitation. You have a very difficult decision ahead  
15 of you. There certainly will be hesitation. A  
16 reasonable doubt is when you consider all the  
17 evidence in total if then you don't know what  
18 happened, then you've got reasonable doubt. I'll  
19 explain some more about reasonable doubt later on.

20 Folks, the evidence we have today and  
21 yesterday was the testimony of the victim that she  
22 had, in fact, been awakened from a sound sleep, that  
23 the Defendant had his knee in her gut, that he had  
24 his hand over her mouth, and that he proceeded to rip  
25 the victim's clothing down, which ended up around her

1 ankles.

2 Now, the Defendant agrees that at the  
3 end of the intercourse the clothing was around her  
4 ankles. The victim says that's what happened. The  
5 distinguishing thing is the Defendant says there was  
6 consent all along, and we've heard a lot of testimony  
7 today specifically about how they were friends, and  
8 we've seen this picture here of them, the Defendant  
9 with his arm around the victim, and this he says  
10 shows the victim and he were friends.

11 From this we are to infer that there  
12 was consent, but you've also heard the testimony of  
13 the Commonwealth witness, and I don't think there's a  
14 discrepancy. They were initially friends. Somewhere  
15 along the line they went different ways. The victim  
16 became afraid of the Defendant. There's never been  
17 any testimony when this photograph was taken. We  
18 don't know. Could have been her first day there when  
19 they were becoming friends. We do know there was a  
20 lot of hugging.

21 This is not an incredible picture.  
22 This is something that happened every single day. As  
23 Mr. Chacona testified, this is something that  
24 happened between himself and the victim probably  
25 sometimes five times an hour. This is nothing.

1 Folks, what you have to consider is  
2 the demeanor and the motivation of each witness you  
3 heard testify. The victim she's trying to be painted  
4 kind of as someone who falls apart all the time. I  
5 suggest to you that's not true. She got up there and  
6 she fell apart. She was reliving the event, and she  
7 did fall a part. She went out and came back, and she  
8 didn't fall apart. Her demeanor was this was an  
9 incredible experience for her. She couldn't handle  
10 it, but she got it together. She is a strong person,  
11 and she exhibited that strength on the stand. She  
12 certainly was affected by something there, and you  
13 heard the testimony of the other Commonwealth  
14 witnesses.

15 Now, they, of course, were not there,,  
16 but the very nature of this type of crime is such  
17 that there aren't witnesses to this type of crime.  
18 It happens between a victim and an assaulter, but we  
19 do know that afterwards she doesn't remember a thing.  
20 She was walking around in a daze. She thought it was  
21 three hours which had passed. We know that from Mr.  
22 Chacona it probably wasn't three hours.

23 She showered immediately afterwards,  
24 bagged the clothing, and stated to Mr. Chacona, I  
25 want it burned. Either she is an extremely good

1 actress or something deeply affected her on that day  
2 as it did yesterday when she took the stand. Mr.  
3 Chacona said it took him nearly an hour to find out  
4 just the word rape. She wouldn't say who did it so  
5 he had to read off names, and immediately when he  
6 said the Defendant's name, the victim broke down and  
7 said, He's gonna kill me. He's gonna kill me.

8 She doesn't remember whose office she  
9 was in. Mr. Chacona says they went to the office of  
10 the night manager. She just says she remembers  
11 seats. Something deeply affected her, and you should  
12 consider that because her demeanor is relevant. The  
13 Defendant's demeanor also is relevant, and I want you  
14 to consider that, and the Judge will instruct you on  
15 that.

16 The Judge will also instruct you about  
17 his plea or convictions in that you should weigh them  
18 when you consider the truthfulness of his testimony.  
19 He'll also instruct you that a Defendant has a  
20 motivation to testify. Certainly the outcome is very  
21 important to the Defendant. So you should consider  
22 that when you weigh whether there's a reasonable  
23 doubt here.

24 I want to suggest a few things to you  
25 also regarding the Defendant's state of mind, which

1 is linked to his demeanor while testifying. His  
2 state of mind immediately after he was told that a  
3 rape -- someone had accused him of a rape was to  
4 leave Pennsylvania, York County, to go to Indiana, to  
5 leave his clothing in Pennsylvania, to leave his  
6 welfare check in Pennsylvania, to leave everything  
7 after his couple months stay at the Colonial House,  
8 and go to Indiana.

9 The Judge will instruct you that  
10 flight to Indiana goes to his state of mind, and you  
11 can consider that he had a guilty state of mind. He  
12 also had guilty state of mind the next day when he  
13 called one of the Commonwealth witnesses and said,  
14 Well, did they catch the other guy? The other guy,  
15 did they get him? So the day after the offense the  
16 Defendant's story was that some other guy had sex  
17 with the victim. Today he testifies it was consent.

18 You must consider those facts when you  
19 weigh whether there's a reasonable doubt, and again a  
20 reasonable doubt is something when you consider all  
21 of the evidence, you don't know what happened here.  
22 I suggest to you that the Commonwealth has proven  
23 beyond a reasonable doubt, not beyond all doubt, and  
24 we don't have to do that. Every time someone has a  
25 statement which counters somebody else there's at

1 least some bit of doubt, but you have to decide when  
2 you consider that testimony was it reasonable. Did  
3 it mesh with everything else I heard. It if wasn't  
4 reasonable, your duty is to convict the Defendant of  
5 the crimes if we have proven every element of the  
6 crime.

7 Rape, as the Judge will instruct you,  
8 is unlawful intercourse with a person not your spouse  
9 by forcible compulsion or by a threat of forcible  
10 compulsion. The victim testified that when the  
11 Defendant got on top of her, he had his hand over her  
12 mouth and said, You tell anyone, I'm going to kill  
13 you. That is at the very least, I suggest, a threat  
14 of forcible compulsion.

15 She also testified that she froze.  
16 She could not move, and she froze on the stand  
17 yesterday when she was reliving it. That is unlawful  
18 intercourse with a person not your spouse by a threat  
19 of forcible compulsion. She also testified that he  
20 held her down. He had his hands on her shoulder  
21 during the act. Earlier he had his hand on the  
22 shoulder and was doing something else. One point he  
23 had a hand on the shoulder and hand on the mouth,  
24 hand on the mouth and pulling down the pants and the  
25 panties.

1           That is forcible compulsion, not just  
2           the threat thereof. That, I suggest to you, the  
3           Commonwealth has proven beyond a reasonable doubt.

4           Terroristic threats is essentially a  
5           threat to do a crime of violence. The threat in this  
6           case was the threat at least made twice, I believe,  
7           by the Defendant, If you tell anyone, I am going to  
8           kill you. And she couldn't tell anyone. She  
9           couldn't tell her best friend at Colonial House. He  
10          had to drag it out of her. It took him 45 minutes.  
11          She was just shaking. That was a threat of violence.  
12          That was terroristic threats.

13          Folks, as I just stated to you the  
14          elements of the crimes, in closing I'd like to say if  
15          you find that, indeed, the Commonwealth has proved  
16          that which we have just argued to you, and my  
17          arguments aren't evidence, they are just argument,  
18          then you must come back with a guilty verdict of rape  
19          and terroristic threats because I suggest to you that  
20          Janet was raped. Thank you very much.

21                 THE COURT: Ladies and gentlemen, this  
22                 is the point at which this Court will give you  
23                 instructions on the law. It is going to take me  
24                 somewhere between 50, 55 minutes to give the  
25                 instruction, and at this point that would run us till



1 about 20 after 12. Normally I would just go ahead  
2 and do that, but there is a judicial conference  
3 scheduled at 12 o'clock today, and if I'm late for  
4 that, I hold up seven other judges. So I think I'm  
5 going to wait till 1:30.

6 I also potentially could bring you  
7 back at 1 o'clock and start early, but I think the  
8 conference will run later than that, and we seem to  
9 have wasted time all morning on one thing or another,  
10 but I don't really see I have any choice.

11 So I'm going to let you be back at  
12 1:15 at the jury room across the hall, and we'll  
13 attempt to start at 1:30. The judicial conferences  
14 sometimes even run past 1:30. So whenever we get  
15 finished, we'll come up and we'll start.

16 Keep in mind the cautions that I gave  
17 you yesterday. You still should not make up your  
18 mind because even though you've heard all the  
19 testimony and the arguments, you still haven't heard  
20 the law. So keep an open mind on the ultimate  
21 conclusion.

22 Also even at this point you still  
23 should not be getting any information from any other  
24 source. At this point you have all the information  
25 you should get. The testimony is complete. So do

1 not have any contact with anybody involved in the  
2 case or obtain any information from any outside  
3 source. With those cautions, you are now excused  
4 until 1:30.

5 \* \* \*

6 (Whereupon, a recess was taken.)

7 \* \* \*

8 CHARGE OF COURT

9 It is now the Court's function to  
10 advise the jury of the law to apply in this matter.  
11 We start with the fundamental principle of our system  
12 of criminal law that a Defendant is presumed to be  
13 innocent, and the mere fact that he is arrested and  
14 accused of a crime is not any evidence against him.  
15 Furthermore, the Defendant is presumed innocent  
16 throughout the trial and unless and until you  
17 conclude based on careful and impartial consideration  
18 of the evidence that the Commonwealth has proven him  
19 guilty beyond a reasonable doubt, and I will define  
20 that for you in a moment.

21 It is not the Defendant's burden to  
22 prove that he is not guilty. Instead, it is the  
23 Commonwealth that has that burden of proving each and  
24 every element of the crime charged and that the  
25 Defendant is guilty of that crime beyond a reasonable

1 doubt.

2 A person accused of a crime is not  
3 required to present evidence or to prove anything in  
4 his own defense. If the Commonwealth's evidence  
5 fails to meet its burden, then your verdict must be  
6 not guilty. On the other hand, if the Commonwealth's  
7 evidence does prove beyond a reasonable doubt that  
8 the Defendant is guilty, then your verdict should be  
9 guilty.

10 Although the Commonwealth has the  
11 burden of proving that the Defendant is guilty, this  
12 does not mean the Commonwealth must prove its case  
13 beyond all doubt or to a mathematical certainty nor  
14 must it demonstrate the complete impossibility of  
15 innocence.

16 A reasonable doubt is a doubt that  
17 would cause a reasonably careful and sensible person  
18 to hesitate before acting upon a matter of importance  
19 in his or her own affairs. A reasonable doubt must  
20 fairly arise out of the evidence that was presented  
21 or out of the lack of evidence presented with respect  
22 to some elements of the crime.

23 Now, that is a little bit dry legal  
24 language. I found that if I give an example, that is  
25 a little bit easier to understand. Typically one

1 thing that would be important to each and every one  
2 of you in your lives is the purchase of a house, and  
3 what is the thought process you go through when you  
4 are thinking of buying a house.

5 First thing you try and do is assemble  
6 all the information you get. Go out and look at  
7 houses and find a particular one that might be  
8 suitable, and you sit down with a realtor and you  
9 offer to purchase the house.

10 You get to the point where you are  
11 going to sign your name on the signature line, and at  
12 that point you start thinking, Well, gee, this is a  
13 real nice house. The price is good. The  
14 neighborhood is good. The house is well maintained.  
15 There is good financing available, all the various  
16 factors that might enter into it. And if after  
17 considering all that you say, Yes, I'm going to do it  
18 and you sign your name as to that decision about  
19 buying a house, you have been convinced beyond a  
20 reasonable doubt.

21 If it is an important matter, you have  
22 thought about it carefully, you have gotten all the  
23 information together, you have considered it, you  
24 have reached a decision, and you were prepared to  
25 proceed forward based on that decision. So as you

1 can see, this is not something that is simply  
2 applicable to the legal system. It is something that  
3 you do all the time, and we are simply asking you to  
4 take that same thought process and apply it to this  
5 case.

6 Recognize that it is a serious and  
7 important matter. Search all the information that  
8 you have been presented. Compare notes about it and  
9 decide, Am I convinced that I am ready to sign my  
10 name on the dotted line. In this case say the  
11 Defendant has been proven guilty beyond a reasonable  
12 doubt. If you are that sure that you would proceed,  
13 then you may convict the Defendant.

14 Instead, if you still have  
15 hesitations, if you still have doubts; for example,  
16 in the home situation suppose when they present you  
17 with the contract you said, Now, wait a minute.  
18 There is some water in the basement. I want to get  
19 that checked out or there is some holes up there I  
20 think they may have termites. I want to get a  
21 termite inspection or whatever it might be. So you  
22 are not prepared to proceed you still need more  
23 information.

24 Here you are not going to get any more  
25 information. You have all the information you are

1 going to get, but if you are still hesitating, if you  
2 are still thinking, Well, gee, I wish I had more  
3 information because I am not sure, then what you say  
4 is not guilty. That is what would be required.

5 So to summarize that, you may not find  
6 the Defendant guilty based on the mere suspicion of  
7 guilt. The Commonwealth has the burden of proving  
8 the Defendant guilty beyond a reasonable doubt. If  
9 it met that burden, then the Defendant is no longer  
10 presumed innocent, and you should find him guilty.  
11 On the other hand, if the Commonwealth does not meet  
12 its burden, then you must find him not guilty.

13 Now, your role in the case is to be  
14 the Judge of the facts. You collectively as a jury  
15 are the Judge of the facts. I am the Judge of the  
16 law. You must accept the law as I am now giving it  
17 to you, but the facts and the credibility decisions  
18 as regard those facts are entirely up to you. This  
19 means you must judge the truthfulness and the  
20 accuracy of each witnesses testimony and decide  
21 whether to believe all, part, or none of that  
22 testimony.

23 Now, in making that decision, again  
24 this is one of those things you do every day in your  
25 own life. Every day you are involved in something

1 involving your family or your business or whatever it  
2 might be you, listen to people, you evaluate what  
3 they tell you, and you make a decision. Do I believe  
4 them, do I not believe them, am I going to act on the  
5 basis of what they told me or not.

6 So the final decision in regard to  
7 those matters depends on what you believe is  
8 important. I'm going to give you certain factors  
9 that I think will be appropriate for you to consider,  
10 but it is your final considered judgment.

11 Consider whether this witness was able  
12 to see, hear or know things about what she testified.  
13 Consider how well the witness remembered and  
14 described the things about which he testified.  
15 Consider whether the witness testified in a  
16 convincing manner. That is, how did he look, act,  
17 and speak while testifying? Was his testimony  
18 uncertain, confused, self-contradicted or evasive?  
19 And when I say he, obviously that means he or she as  
20 the case may be. Did the witness have any interest  
21 in the outcome of the case any bias, prejudice, or  
22 other motive that might have affected the Defendant.

23 Finally, consider how the testimony of  
24 the witness squares with other evidence in the case,  
25 including the testimony of other witnesses. That is,

1 was it contradicted or supported by the other  
2 testimony and the physical evidence. Does it all  
3 make sense when considered together.

4 If you do believe some part of the  
5 testimony of a witness to be inaccurate, then you may  
6 consider whether that inaccuracy casts doubts upon  
7 the rest of that witness's testimony, and this may  
8 depend on whether this witness has been inaccurate in  
9 an important matter or merely a minor detail and  
10 whether or not there has been an explanation.

11 For example, did the witness make an  
12 honest mistake, did he simply forget, or did he  
13 deliberately testify falsely.

14 Now, those rules apply to each witness  
15 separately, but you cannot really look just at each  
16 witness separately. You have to look at them in  
17 conjunction with the other witnesses testimony as  
18 well, and when you do that, you may find that there  
19 is a clear conflict

20 One person says something is black.  
21 The other person says something is white. They  
22 cannot both be right. You then have to resolve that  
23 conflict. That is part of your function as jurors.

24 The first thing you should try to do  
25 is fit together, that is, to reconcile the conflicts



1 if you can fairly do so. If you can't, then you  
2 should remember that discrepancies and conflicts  
3 between the testimony of different witnesses can  
4 cause you to disbelieve some or all of their  
5 testimony. However, remember that two or more  
6 persons witnessing an incident may see or hear it  
7 differently. It is not uncommon for an innocent  
8 mistake on his recollection of how something  
9 happened.

10 If you cannot reconcile the conflict,  
11 then it is up to you to decide which testimony, if  
12 any, to believe and which to reject as untrue or  
13 inaccurate.

14 Keep in mind that in deciding this  
15 question you should not necessarily be swayed by the  
16 number of witnesses on either side. It is not a  
17 question of who had the most witnesses, but how good  
18 those witnesses are.

19 Finally, look at whether this conflict  
20 involves a matter of importance or merely some minor  
21 detail, and whether this conflict is brought about by  
22 an innocent mistake or intentional falsehood.

23 In this case, as in all cases, there  
24 are two types of evidence, direct evidence and  
25 circumstantial evidence. Direct evidence is

1 testimony by a witness from his own personal  
2 knowledge such as something that he saw or heard  
3 himself, and I think that is self-explanatory.

4           The other type of evidence is what we  
5 call circumstantial evidence, and that is testimony  
6 about facts which then point to the existence of  
7 other facts which are in question. Whether or not  
8 circumstantial evidence is proof of the other facts  
9 in question depends in part on the application of  
10 common sense and human experience.

11           What we are saying is that you can  
12 take one fact and say from that I infer that this  
13 other fact must also be true because it would  
14 automatically follow because this fact is true, then  
15 this other fact also has to be true. There is no  
16 other explanation or no other way to account for it  
17 other than the other fact is also true.

18           Again perhaps an example will make  
19 this easier. Example I normally use is that you and  
20 a friend are going to the movies. It is a bright  
21 sunny day when you go in. You come back out, and the  
22 street is all wet. You probably turn to your friend  
23 and say, Gee, it must have rained when we were in the  
24 movie. Now, you did not see it raining. You were  
25 not there when this water was coming down, and yet

1 you have drawn a conclusion. You have looked at the  
2 fact that the street is wet, and you said it did  
3 rain. That is circumstantial evidence that it  
4 rained.

5 Now, the catch is that you cannot do  
6 this unless that is the only possible explanation.  
7 If there is some other explanation, for example, in  
8 my example that would explain how the street got wet,  
9 then obviously you would not assume that it rained  
10 because you would have an alternative explanation of  
11 how the street got wet.

12 Perhaps there is a street cleaner just  
13 went by or perhaps they had a fire down the corner, a  
14 fire hydrant is being used to fight a fire, and the  
15 hose came off and the water ran out of the hydrant  
16 and the street got all wet. You have to be satisfied  
17 that there is no other possible explanation.

18 However, you want to look at all the  
19 facts so if the street is wet, but in addition you  
20 notice that there is some black clouds going off in  
21 the distance, and that the cars that are going by  
22 still have their windshield wipers going, and the man  
23 down at the corner with his umbrella is shaking the  
24 water off putting it away, and you are standing at a  
25 tree and there is water dripping off the branches,

1 and not only is the street wet but the sidewalk is  
2 wet and the lawn is wet and everything around you is  
3 wet, now from all of those facts clearly you would  
4 conclude that it did rain. There is no other way  
5 that all those things could be true other than the  
6 fact that it rained.

7           Again we are suggesting that you can  
8 take that same thought process and apply it to this  
9 case. If you can state that there is one fact in  
10 this case that leads to the existence of another  
11 fact, that is the only possible explanation for  
12 having occurred that way, then you may treat that as  
13 proof of the second fact.

14           Now, there is two keys. One is that  
15 the one fact does inescapably lead to the other is  
16 also true and also that the first fact, the one that  
17 you are making the inference from, be accepted by you  
18 as being a true statement. When a witness gives  
19 testimony, you do not necessarily have to believe it.  
20 So you may say, Well, no, I do not believe that.  
21 Then obviously you would not draw any inference from  
22 it.

23           Whatever type of evidence you use, it  
24 can be direct testimony alone, it can be  
25 circumstantial evidence alone, or it can be some

1 combination of the two, you must be convinced by all  
2 of the evidence as to each and every element of the  
3 crime charged that the Defendant is guilty beyond a  
4 reasonable doubt before you can convict; and if you  
5 are not convinced beyond a reasonable doubt as to  
6 each and every element, then you must find the  
7 Defendant not guilty.

8 Now, there is several other general  
9 rules that apply here. One, you heard testimony that  
10 the Defendant had previously been convicted of  
11 several offenses up in Adams County, I believe. That  
12 information was permitted into testimony for a very  
13 limited purpose. Specifically, it was not to show  
14 that the Defendant is a bad person and, therefore, it  
15 is more likely that he committed this crime. That  
16 would be inappropriate for to you consider it in that  
17 fashion, and I instruct you not to do so.

18 However it is permissible in the sense  
19 that it is what we call crimens falsi. That is the  
20 actions for which this Defendant was convicted  
21 involve crimes of dishonesty or falseness, and as I  
22 told you earlier, if you find that somebody has lied  
23 to you in the past, that can be a factor in your  
24 decision as to whether you believe them now. So you  
25 can treat that as if the Defendant had told a lie in

1 the past. He has admitted the conduct that was  
2 similar to telling a lie, conduct involving  
3 dishonesty and being false.

4 Now, obviously, that does not  
5 automatically mean he is lying today. A person can  
6 lie to you sometime in the past and be telling you  
7 the truth today. It is just a factor for you to  
8 consider in determining the Defendant's credibility,  
9 but make sure you understand that it is limited  
10 solely to that purpose, that is, determining  
11 credibility, and you cannot look at the overall  
12 picture and say, Well, gee, he committed crimes. He  
13 is a bad guy. He is more likely to be guilty. You  
14 cannot do that. You can only use it for credibility.

15 There was evidence which tended to  
16 show that the Defendant fled at the time that he was  
17 advised that a crime had been committed or whatever  
18 it is that he was advised of. There was some dispute  
19 about that. Counsel went back and forth a couple  
20 times on exactly what the Defendant was told.

21 Generally speaking, when a crime has  
22 been committed and a person thinks he is or may be  
23 accused of committing it, and he then flees or  
24 conceals himself, such flight or concealment is a  
25 circumstance tending to prove that the person is

1 conscious of guilt. However, such flight or  
2 concealment does not necessarily show consciousness  
3 of guilt in every case. A person may flee or hide  
4 for some other motive and may do so although  
5 innocent.

6 Whether this evidence of flight or  
7 concealment in this case should be looked at as  
8 tending to prove guilt depends upon the facts and  
9 circumstances of this case and especially upon  
10 motives which may have prompted the flight or  
11 concealment.

12 Of course, the Defendant says, Well,  
13 yeah, I did leave the jurisdiction, but it was  
14 because I knew I did something wrong; that is, I had  
15 consensual sex. That in itself is a violation of the  
16 rules of the halfway house, and I was going to get  
17 thrown out anyway. I knew I was going to get in  
18 trouble, so I just went ahead and left. If you  
19 accept that, then obviously that would not  
20 necessarily show that he was guilty of the crime of  
21 rape. He is leaving, and he is showing consciousness  
22 of doing something wrong, but it is something  
23 different wrong, and it is a minor violation rather  
24 than rape.

25 The weight of that is up to you to

1 decide taking all the factors and circumstances into  
2 account and as you evaluate them.

3 Now, we will turn to the actual  
4 elements of the crimes that are involved. There are  
5 two crimes. One is rape by forcible compulsion or  
6 the threat of forcible compulsion, and the other is  
7 terroristic threats. So you will have two verdicts  
8 to announce when you come back to the courtroom.  
9 Guilty or not guilty of rape, and guilty or not  
10 guilty of terroristic threats, and you will have to  
11 have verdicts for both of those charges.

12 I will take rape first. A man commits  
13 rape if he has sexual intercourse with a female who  
14 is not his spouse either by forcible compulsion or by  
15 the threat of forcible compulsion that would prevent  
16 resistance by a reasonably resolute female. The  
17 force used or threatened by the man can be physical  
18 force or violence, but it does not have to be. It is  
19 legally possible for a man to commit rape by using or  
20 threatening psychological, moral or intellectual  
21 force.

22 Now, in this particular case I believe  
23 there has only been direct testimony of physical  
24 force. However, that is the law. You are to look at  
25 the circumstances. You are to decide what the threat



1 or what force was involved, and as with all matters  
2 this is within your province to decide.

3 In order to find the Defendant guilty  
4 of rape, you must be satisfied that the following  
5 three elements have been proven beyond a reasonable  
6 doubt. First, that the Defendant compelled the  
7 victim to have sexual intercourse with him against  
8 her will; second, that he did so by force or by  
9 threat of force, threat being the kind of threat  
10 which would have prevented a reasonably resolute  
11 female from resisting if she were in the same  
12 situation as the victim; and, third, that the victim  
13 was not the Defendant's spouse, that is, not his  
14 wife.

15 Now, I used the term sexual  
16 intercourse. That has a special meaning in the law  
17 of rape. A man has sexual intercourse with a female  
18 if he penetrates her female sexual organ with his  
19 penis to the slightest degree. He does not have to  
20 emit any semen. As I said before, the force used or  
21 threatened can be, but does not have to be, physical  
22 force or violence. A man can commit rape either by  
23 using or threatening psychological, moral, or  
24 intellectual force.

25 Now, I am speaking about something

1 very different from the sort of argument, persuasion  
2 or seduction that might induce a female voluntarily  
3 to consent to intercourse. A man's words or conduct  
4 towards a female cannot amount to the use of  
5 psychological, moral, or intellectual force unless  
6 they wrongfully impair her freedom of will and her  
7 ability to chose whether to have sex with the man.

8 Note that in defining these legal  
9 requirements of rape, I have not indicated any  
10 requirement that the woman put up a fight or resist  
11 nor that the man employ or threaten force likely to  
12 cause serious bodily injury. However, you should  
13 consider those factors, consider the kind of evidence  
14 and the amount of force and the extent of the  
15 resistance along with the evidence of all the other  
16 relevant facts and circumstances when deciding  
17 whether you are satisfied that the Defendant  
18 compelled the victim to have sexual intercourse with  
19 him against her will and that the Defendant did so  
20 either by force or threat of force which is  
21 sufficient for rape.

22 Now, that sounds a little bit  
23 wishy-washy to a certain extent, and there is a  
24 reason for that. In explaining to you, I cannot  
25 refer to specific facts because I do not yet know

1 what the facts will be as you find them. So I must  
2 give you all the various alternatives. You need  
3 first to decide what the facts are, and then having  
4 decided what the facts are, focus on the specific  
5 elements of the charge that applies to that.

6 I indicated to you you had two  
7 decisions to make. One is with regard to rape, the  
8 other with regard to terroristic threats.

9 Within the rape charge itself there  
10 are two sub-decisions to make. One, did the  
11 Defendant commit the crime of rape by using force,  
12 that is, his conduct was such that by his physical  
13 actions he forced the victim to submit to this, and  
14 that would be sufficient to be convicted of the  
15 charge of rape; or even if you find there was no  
16 actual force, if you found that there was the threat  
17 of force, that also could be sufficient if that  
18 threat of force was in itself so overwhelming as to  
19 be the equivalent of actual force in your minds as to  
20 her ability to resist it.

21 So if you find that, for example, as  
22 was testified to that he threatened to kill her and  
23 that to her that was just as overwhelming as if he  
24 had simply held her down and done it against her  
25 wishes and that a reasonably resolute person would

1 have reacted the same as she did, then under the  
2 circumstances, thinking he might really carry it out,  
3 she, therefore, put up no resistance, those facts  
4 could be sufficient for you to find the Defendant  
5 guilty.

6                   However, just because I am explaining  
7 these various examples to you does not mean that I am  
8 implying that is what you are suppose to do. I am  
9 not trying to tell you to do anything. Do not try to  
10 read between the lines what I am saying. That is  
11 your job, and you have to determine from all the  
12 facts and circumstances here whether or not these  
13 definitions have been met.

14                   Let us turn to the elements of the  
15 second offense, which is terroristic threats, and to  
16 a certain extent, obviously, this is interrelated.  
17 The Defendant has been charged with the crime of  
18 terroristic threats. In order to find the Defendant  
19 guilty of that crime you must find that each of the  
20 elements of the crime has been satisfactorily  
21 established beyond a reasonable doubt.

22                   There are two elements. One, that the  
23 Defendant threatened to commit a crime of violence.  
24 In this case I am referring to the testimony that the  
25 Defendant threatened to kill the victim. And,

1 second, that the Defendant acted with the intent to  
2 terrorize another person.

3 A person acts with intent if it is his  
4 conscious object or purpose to engage in particular  
5 conduct or to cause a particular result. In this  
6 case the particular result we are talking about is  
7 that by his threats he attempted to prevent her from  
8 telling anybody about what had occurred. So you have  
9 to find that he did threaten to kill her, and that  
10 his intent was to cause that particular action, that  
11 is, to cause her not to tell anybody about it.

12 If after considering all the evidence  
13 you find the Commonwealth has established beyond a  
14 reasonable doubt both of those elements, then you  
15 should find the Defendant guilty of terroristic  
16 threats. Otherwise, you must find the Defendant not  
17 guilty.

18 Now, you will note that in among your  
19 options was not an option of, well, gee, I think he  
20 is guilty, but I am not sure, or I think he is  
21 innocent. There is only two options. One, you are  
22 so convinced beyond a reasonable doubt that he is  
23 guilty or else you say not guilty, and that includes  
24 all the other available options such as, well, I  
25 think he is guilty or I am pretty sure he is guilty

1 or I think he is innocent, whatever it might be. It  
2 either rises to the level of a conviction, or it does  
3 not and you say not guilty.

4 It is your responsibility to accept  
5 these instructions I have given you as to the law.  
6 However, you collectively are the judge of the facts.  
7 It is your responsibility to consider the evidence,  
8 to find the facts, and to apply the law to the facts  
9 as you find them and decide whether this Defendant  
10 has been proven guilty beyond a reasonable doubt.

11 Your decision in this case is  
12 obviously a matter of considerable importance.  
13 Remember it is your responsibility as jurors to  
14 perform your duties and to reach a verdict based upon  
15 the evidence as it was presented during the trial.  
16 However, in deciding the facts, you must properly  
17 apply common sense and draw upon your every day  
18 practical knowledge of life as each of you has  
19 experienced it.

20 You should keep your deliberations  
21 free of any bias or prejudice. Both the Commonwealth  
22 and the Defendant have a right to expect you to  
23 consider the evidence conscientiously and to apply  
24 the law as I have outlined it to you.

25 You will note that in reviewing the

1 case I did not go into an extensive review of the  
2 facts. This was a fairly short case. I am sure you  
3 have all the testimony fresh in your memory. To the  
4 extent I have commented on the facts to make a point  
5 as to the law involved, as I have indicated, I have  
6 not indicated anything in regard to how you should  
7 decide. My reference to the facts was merely to use  
8 examples for the purposes of explaining the law to  
9 you. It is your responsibility to decide the facts,  
10 and that is entirely up to you.

11 In arriving at your verdict, you  
12 should not concern yourself with any possible future  
13 consequences of your verdict. If you find the  
14 Defendant guilty, then it will be up to the Court at  
15 a later time to determine what his sentence might be.  
16 The Court would be presented a presentence  
17 investigation, further background information about  
18 the Defendant, before coming to any decision. So at  
19 this point even I do not know what it might be, but  
20 you just do not worry about that. You do not have  
21 anything to do about that.

22 Your function is merely to say guilty  
23 or not guilty. Of course, if you say not guilty,  
24 there would be no sentences. So that again would not  
25 be part of your consideration.

1                   Upon retiring to deliberate, the first  
2                   thing you should do is select one of you to be the  
3                   foreperson, and that person will be the one to  
4                   announce your verdict when you come back into the  
5                   courtroom. That person also would conduct your  
6                   deliberations, recognize whose turn it is to speak,  
7                   perhaps conduct a ballot to see if you arrived at a  
8                   verdict or not. However, the foreperson has only one  
9                   vote just like everybody else.

10                   Your verdict must be unanimous. That  
11                   means all twelve of you must agree to that verdict.  
12                   However, you do have a duty to consult with each  
13                   other and to deliberate with a view towards reaching  
14                   an agreement if that can be done without doing any  
15                   violence to your own individual judgment. Each of  
16                   you must decide the case for him or herself but only  
17                   after there has been impartial consideration with  
18                   your fellow jurors.

19                   In the course of deliberations each  
20                   juror should not hesitate to re-examine his or her  
21                   own views and change his or her opinion if convinced  
22                   it is erroneous. However, no juror should surrender  
23                   an honest conviction as to the weight or effect of  
24                   the evidence solely because of the opinion of his or  
25                   her fellow jurors or for the mere purpose of



1 returning a verdict.

2 Do counsel have any suggested changes  
3 or additions to the charge? If so, please approach  
4 sidebar.

5 MR. MACVEIGH: Could we, please?

6 THE COURT: Sure.

7 \* \* \*

8 (Whereupon, the following discussion  
9 was held on the record at sidebar:)

10 MR. MACVEIGH: I'm just thinking out  
11 loud right now, Judge. I don't know whether you gave  
12 the standard instruction about fear or favor,  
13 sympathy, and prejudice, but given that she had a  
14 breakdown here yesterday, I wish you would.

15 THE COURT: I think I read that part.

16 MR. MACVEIGH: Do you know?

17 MR. KELLEY: Yeah, he did.

18 MR. MACVEIGH: Okay.

19 THE COURT: I'll just save -- I'll  
20 mention it. Just to be safe, I'll mention it.

21 (Whereupon, the discussion held at  
22 sidebar was concluded.)

23 \* \* \*

24 THE COURT: Counsel has asked if I had  
25 given that portion of the charge about keeping your

1 deliberations free of any bias or prejudice. I think  
2 I read that part, but just in case I skipped over it,  
3 I'll mention it again and, for example, would make  
4 reference to the fact that the victim broke down  
5 during the course of the proceedings.

6 Your sympathy for her would not be  
7 appropriate in reaching a verdict. It is proper for  
8 you to consider her demeanor and the way she reacted  
9 in determining whether she is telling the truth or  
10 not, but mere sympathy for her position would not be  
11 an appropriate matter.

12 With that additional instruction, I  
13 will conclude. It is now ten after two. We will be  
14 here awaiting your verdict. If you arrive at a  
15 verdict quickly, come back and tell us what your  
16 verdict is. If it takes you a couple hours, we will  
17 wait. However long it takes you to deliberate, that  
18 is how long it is appropriate to deliberate.

19 I would call your attention to the  
20 fact that it is possible to communicate with the  
21 Court if you have some question about the matters of  
22 law that I just explained to you. It is not easy,  
23 but it is possible. I only mention that because it  
24 is fairly time consuming. If you would need to ask a  
25 question, you have to write it down on a piece of

1 paper, have it signed by the foreperson, knock on the  
2 door, and give it to the tipstaff. He brings it to  
3 me. I call the attorneys in. We talk about what the  
4 appropriate answer is. We then bring you back in the  
5 courtroom, and we go through the same process we are  
6 going through now. Obviously that takes 20, 25  
7 minutes to do. So please don't do it lightly.

8 Before you do it, the first thing you  
9 should do if you don't remember something is talk to  
10 your fellow jurors. Maybe somebody else remembers  
11 exactly what was said, and between the group of you  
12 you can resolve it satisfactorily. But if after you  
13 have all discussed it you all arrive at the point  
14 where you say, Well, gee, we are not sure about this,  
15 we want to ask the Judge, that procedure is  
16 available.

17 The case is now with you. We'll be  
18 awaiting your verdict. You may retire to the jury  
19 room.

20 \* \* \*

21 (Whereupon, the jury retired to  
22 deliberate upon a verdict.)

23 \* \* \*

24 THE COURT: Let the record show that  
25 the Defendant and counsel are present in the

1 courtroom, and that the jury has announced a verdict.  
2 You may take the verdict, please.

3 THE CLERK: Will you please stand.  
4 Ladies and gentlemen of the jury, have you agreed  
5 upon a verdict?

6 THE JURY: Yes.

7 THE COURT: Who shall speak for you?

8 THE FORELADY: I will.

9 THE CLERK: What say you in the issue  
10 joined between the Commonwealth of Pennsylvania and  
11 the Defendant, Calvin Roth? Do you find the  
12 Defendant guilty or not guilty of rape?

13 THE FORELADY: Guilty.

14 THE CLERK: Guilty or not guilty of  
15 terroristic threats?

16 THE FORELADY: Guilty.

17 THE CLERK: Ladies and gentlemen of  
18 the jury, hear your verdict as the court has recorded  
19 it. You find the Defendant guilty of rape, guilty of  
20 terroristic threats, and so say you all?

21 THE JURY: Yes.

22 THE COURT: All right, ladies and  
23 gentlemen, that concludes your service in the case.  
24 We thank you for your efforts. You may return to the  
25 Central Jury Room.

1 Mr. Roth, even though the jury has  
2 found you guilty, you still have certain rights  
3 including specifically the right to appeal their  
4 decision. If you find that legal mistakes were made  
5 in the course of the trial, you may file a motion for  
6 a new trial or in arrest of judgment. Any matter  
7 that you do not raise in those motions would be  
8 considered waived. Motions must be filed within 10  
9 days of today's date.

10 You are entitled to have counsel for  
11 that purpose. Mr. MacVeigh will continue to  
12 represent you, and you should consult with him as to  
13 whether you should appeal or not and what possible  
14 grounds there may be to appeal. Do you have any  
15 questions about any of those matters?

16 DEFENDANT ROTH: No.

17 THE COURT: All right. Do you wish on  
18 the record to advise Mr. MacVeigh at this point of  
19 your desire to appeal?

20 DEFENDANT ROTH: Yeah, I want to  
21 appeal it.

22 THE COURT: Very well. We'll note  
23 that for the record. Mr. MacVeigh can act  
24 accordingly.

25 We direct that there be a presentence

1 investigation. Defendant to return for sentencing on  
2 September 2nd, 1993, at 9:30 a.m. Should any motions  
3 be filed, argument of those motions will be August  
4 19th, 1993, at 9:30 a.m.

5 Okay. Any questions?

6 DEFENDANT ROTH: Yeah. If I appeal  
7 this case, right, I want -- I mean does it have to be  
8 in this county?

9 THE COURT: Yes.

10 DEFENDANT ROTH: It's got to be? I  
11 can't take it out of this county and take it to  
12 another county?

13 THE COURT: No, you can't take it to  
14 another county, but after you file motions here, if  
15 they are refused, then you would have the right to  
16 appeal again to the Superior Court.

17 DEFENDANT ROTH: Well, that's what I'm  
18 talking, Superior Court.

19 THE COURT: But you have to file them  
20 here first in order to preserve the issues for the  
21 record of a ruling made by the lower court as to  
22 those matters of error that you are raising, and then  
23 it is those matters that you would be allowed to  
24 appeal further. So you have to make the record down  
25 here first.

1 DEFENDANT ROTH: Okay.

2 THE COURT: Defendant is remanded to  
3 jail. Does he have bail at the present time?

4 DEFENDANT ROTH: No, I don't have no  
5 bail.

6 THE COURT: Is there any bail set at  
7 all?

8 MR. KELLEY: I think he was returned  
9 as a fugative from Indiana.

10 THE COURT: Let me say for the record  
11 to the extent that any bail exists it is hereby  
12 revoked, and the Defendant is remanded to the York  
13 County Jail without bail pending any appeal.

14 \* \* \*

15 (END OF PROCEEDINGS)

16 \* \* \*

17

18

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24

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C E R T I F I C A T I O N

I hereby certify that the proceedings  
and evidence and Charge are contained fully and  
accurately in the notes taken by me on the trial of  
the above cause, and that this copy is a correct  
transcript of the same.

Debra S. Romesberg  
Debra S. Romesberg,  
Official Court Reporter

The foregoing record of the proceedings  
upon the trial of the above cause is hereby approved  
and directed to be filed.

John H. Chronister,  
Judge





IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

Criminal Division

COMMONWEALTH OF PENNSYLVANIA : No. 2341 CA 1992

vs.

Calvin W. Roth, Jr.

: Rape  
: Escape  
: Terroristic Threats

MOTION FOR NEW TRIAL

And now, this 27th day of July, 1993, the above named defendant, by his attorney, J. David MacVeigh, moves the Court for a new trial in the above captioned matter for the following reasons:

1. That the defendant was convicted on July 21, 1993, after a jury trial before Judge John H. Chronister.
2. That during direct examination the victim broke down weeping and sobbing.
3. That the court recessed the trial, but the victim's sobs were even louder while she was outside the courtroom than while she was on the stand.
4. That this took place within the view and hearing of the jury.
5. That the court erred in denying the defendant's motion for mistrial after the incident described above took place.

Respectfully submitted,

*J. David MacVeigh*  
J. David MacVeigh  
Assistant Public Defender



IN THE COURT OF COMMON PLEAS OF YORK COUNTY,  
PENNSYLVANIA

COMMONWEALTH : No. 3341 C. A. 1992  
VS :  
CALVIN WILLIAM ROTH, JR. : 1) Escape  
: 2) Rape  
: 3) Terroristic Threats  
(Argument)

York, Pa., Thursday, August 19, 1993

Before the Honorable John H. Chronister, Judge

APPEARANCES:

THOMAS H. KELLEY, Esquire  
Assistant District Attorney  
For the Commonwealth

J. DAVID MacVEIGH, Esquire  
Assistant Public Defender  
For the Defendant

\* \* \*

MR. KELLEY: Your Honor, the Commonwealth calls the case of Calvin William Roth, Jr., 2341 Criminal Action of 1992. The Defendant is charged with escape, rape, terroristic threats. Trial was held before Your Honor 21st of last month in which the Defendant was convicted of all charges.

Actually, he had earlier pled guilty to the escape charge.

We are here on the Defendant's post-trial motions for a new trial.

MR. MacVEIGH: Your Honor, in reviewing the record established at trial, the issue that arose to my mind was the Court's failure to

declare a mistrial despite my request. I have to admit, however, that my research has disclosed no cases that overturned or that held it an abuse of discretion when the Trial Court failed to declare a mistrial particularly where a cautionary instruction had been given. Now, the nature of the cautionary instruction in the research was never delineated.

A long story short, I can't find at this point any authority to support the proposition I'm putting to the Court, but I would hope that the Court would recognize that the interest here lies not only in obtaining conviction but in obtaining a conviction properly.

THE COURT: Mr. Roth, is there anything you wish to add to that? We're talking about legal mistakes made at trial at this point. I recognize that Mr. MacVeigh is the legal person here and you're not, but anything you want to say, I'll be happy to hear.

THE DEFENDANT: This is my --

THE COURT: This is not sentencing. This is just in regard to mistakes made at trial, if any, and any reason why you should be given a new trial. Is there anything that you think that was done wrong --

THE DEFENDANT: Yeah, because --

THE COURT: -- that Mr. MacVeigh didn't raise?

THE DEFENDANT: Yes. He did what he was supposed to do. I mean, to my knowledge he has done okay. I think he did his job but what I seen there was a couple things that shouldn't -- that wasn't even brought up. I mean, there was things that I wanted; people to be there that wasn't here, and plus there was things that I wanted here. I mean, like I said, people that wasn't here. I mean, I wanted people here. Like the doctor should have been here.

There was no evidence shown through the State of the box -- the stuff that they said that they had. I never seen nothing in trial. Okay.

There was things said and I didn't even get a chance to say what I really wanted to say on that stand because I was cut off, and it was a lot that wasn't said. I mean, that's all I can say. There was a lot that wasn't said. A lot of people that wasn't here --

THE COURT: Very well.

THE DEFENDANT: -- that should have been here.

THE COURT: Those are matters that would come up more correctly in regard to a motion for a new trial on the basis of after-discovered evidence or for ineffective assistance of counsel or something like that. They don't really apply to errors made at the actual trial, and you'll have to discuss those matters with Mr. MacVeigh. And if he believes it appropriate, he can try to follow-up on those matters, but they're not in front of me this morning.

All right.

As to the motion for a new trial that was filed, the Court finds that the Defendant was not entitled to a mistrial based on the fact that the victim broke down weeping and sobbing during the course of the trial. It was well within the Court's discretion to instead take a brief recess, allow the victim to compose herself and return to the witness stand and allow testimony to resume.

Therefore, the Defendant's motion for a new trial is hereby refused, and the case will proceed for sentencing on the previously scheduled date.

MR. MACVEIGH: Was the previously scheduled date September the 2nd?

THE CLERK: Yes.

\* \* \*

sjl



IN THE COURT OF COMMON PLEAS OF YORK COUNTY;

PENNSYLVANIA

COMMONWEALTH	:	No. 2341 C. A. 1992
	:	
VS	:	1) Escape
	:	2) Rape
CALVIN W. ROTH, JR.	:	3) Terroristic Threats

[SENTENCE]

York, Pa., Thursday, September 2, 1993

Before Honorable John H. Chronister, Judge

APPEARANCES:

THOMAS H. KELLEY, Esquire  
Assistant District Attorney  
For the Commonwealth.

J. DAVID MACVEIGH, Esquire  
Assistant Public Defender  
For the Defendant.

\* \* \*

MR. GRAFF: Good morning, Your Honor.  
The first matter before you is the matter of the  
Commonwealth versus Calvin William Roth, Jr.  
It is No. 2341 Criminal Action of 1992. Mr. Roth is  
charged with escape, rape, and terroristic  
threats.

After a trial on July 21, 1993,  
the Defendant was found guilty of rape and  
terroristic threats and had pled guilty to the escape  
charge. He's before you today for sentencing  
purposes.

Does Your Honor have a copy of the  
pre-sentence investigation?

MR. MACVEIGH: Mr. Roth has read the



pre-sentence report and tells me it's essentially accurate.

During the trial the victim does not testify to having been felt very sore. I recall that she did testify that his hands were on his shoulders but there were no wounds.

Your Honor, we are, of course, bound by the jury's decision here. My client nonetheless maintains his innocence and it's for that reason that he would not feel any sense of remorse.

To sentence in the upper -- I shouldn't even call it upper ends of the aggravated range. To sentence to the maximum possible, I just don't see a reason for it.

I would point out that the victim was not injured physically to the extent that she needed any kind of medical treatment as far as I'm aware.

There have been, and I'm sure this Court has tried cases in which the victims were far more seriously injured than was this victim; and as a result of that, Your Honor, I would hope that you would see fit to sentence Mr. Roth in the standard range or at least not at the maximum that the law permits.

Of course, he had pled guilty to the escape and I think the Court should take into consideration that a person's admission of guilt is considered in I suppose mitigating the effects of the sentence.

Mr. Roth, you can tell Judge Chronister anything you'd like to say.

THE DEFENDANT: I ain't got nothin' to say.

THE COURT: Very well.

MR. KELLEY: Your Honor, I would just like to state for the Court that the Defendant was at the time of this offense incarcerated for a simple assault which occurred in Adams County.

He was receiving drug and alcohol treatment at the time he committed the offense. After having committed the offense, he left the jurisdiction of Pennsylvania and went to Indiana.

The amount of time he was gone from Pennsylvania escapes me but while he was in Indiana he committed another offense for which he received a sentence of, I believe, 5 to 12 years.

The Commonwealth's position is that this particular Defendant, the gravity and the seriousness of his crimes, has continued to escalate from the time he was a juvenile to the instant offense.

I think based upon the fact that he was incarcerated at the time and the fact that something was, indeed, taken from the victim, although she was not seriously injured at the time, I think that there was sufficient testimony to put this into the aggravated range and, therefore, we stand by the recommendation of the probation and parole department and ask that you sentence in the aggravated range.

THE COURT: Is there some reason why the pre-sentence report does not contain a recommendation in regard to the terroristic threats?

MR. KELLEY: No. I don't have an excuse for that omission, Your Honor.

THE COURT: Do you agree, Mr. MacVeigh, it's appropriate to impose terroristic threats as well as the other offenses?

MR. MACVEIGH: I have no objection to that. I would say it's all part and parcel of the same incident.

\* \* \*

O R D E R

The Court has had the benefit of a pre-sentence investigation, which we incorporate by reference into the sentencing colloquy.

The Court agrees with the pre-sentence report that the Defendant does not appear to be amenable to treatment or rehabilitation as evidenced by his past behavior.

The Court believes it appropriate to impose maximum sentences because of the Defendant's extensive prior record because of the fact that the crime was committed at a time when the Defendant was incarcerated. Although he was in a halfway house program, it still was incarceration.

The Court also takes into consideration the fact that when the Defendant left the state, which was an escape from incarceration, that he committed another offense in another state of a very serious offense.

We also take into account the effect this has had on the life of the victim. To say that serious injuries were not imposed on this victim then that is to belittle the serious nature of the injuries.

Be they psychic or physical, the Court believes they are still very serious. This is going to have a tremendous impact on this victim's life and we believe that perhaps the psychic nature of the injuries are worse than the physical injuries may have been.

We also take into account the Defendant's threat to the victim to kill her if she reported the incident or called it to the attention of the authorities.

The Court considers all of those matters aggravating factors which call for a imposition of a maximum sentence. Therefore, in the rape case, the Defendant is sentenced to 10 to 20 years in the state penitentiary.

On the terroristic threats, the Defendant is sentenced to one to two years consecutive to the rape sentence.

And in regard to the escape, the Court believes that as escapes go this was not the most horrible of escapes. Clearly, the Defendant was in a

halfway house and in which he could easily leave. But it is not a situation where he broke out of jail, so to speak; and, therefore, on the escape, we will not impose the maximum sentence.

We impose a sentence of 3 to 6 years in the state penitentiary.

The Defendant is also directed to pay the costs of prosecution, all of these sentences to be consecutive to each other and to be consecutive to any other sentence that the Defendant is now serving in this or any other state.

The Defendant shall receive credit for time served.

\* \* \*

THE COURT: Mr. Roth, you are now advised that you have the right to appeal this sentence; and if you wish to appeal, you have the right to have an attorney and Mr. MacVeigh will continue to represent you.

You have the right to represent yourself if you don't want Mr. MacVeigh. If you wish to appeal, the appeal must be filed to the Appellate Court within 30 days of today's date. Failure to do so will waive your right to appeal.

THE DEFENDANT: I don't want David MacVeigh as my lawyer. I want another lawyer. I'm asking the Court for another lawyer.

THE COURT: I acknowledge your request. The Public Defender's Office will continue to represent you. As to which public defender it may be is an option of the Public Defender's Office.

If they wish to continue you with Mr. MacVeigh, that is up to them and not to the Court.

If you feel that Mr. MacVeigh has done something improper and that is the basis that he was ineffective in his representation, then you would have to file a petition under the Post Conviction Relief Act and set forth in that petition the bases

that you have of why you believe that Mr. MacVeigh did not do what he was supposed to do; however, that will not stop your time running on your right to file an appeal.

If you want an appeal filed whether you continue with Mr. MacVeigh, you should instruct him that you want an appeal.

THE DEFENDANT: I want an appeal.

THE COURT: We note for the record that you do want an appeal filed and instruct Mr. MacVeigh to file it.

After it's filed if you want to pursue the matter of another counsel, you have to do it by written petition and the mere fact that you say you want a different lawyer is not good enough.

You have to show specific reasons that Mr. MacVeigh did something wrong and why and that whatever he did wrong affected the trial, in which case there would be a possibility of a new lawyer; but it would only be after hearing and there is an opportunity for Mr. MacVeigh to explain whatever it is you are accusing him of doing improper and what his reasons were for doing what he did.

So at this point he's still your attorney and I'm instructing Mr. MacVeigh to file the appeal. And if he believes the appeal is not valid, he can take whatever the appropriate step is. At this point if you don't want him, you can file a petition.

THE DEFENDANT: I'm filing one because I don't want him.

MR. MACVEIGH: Consecutive to one another?

THE COURT: To any other sentence.

MR. MACVEIGH: And consecutive to each other?

THE COURT: Yes.

MR. MACVEIGH: So the total sentence is 14 years as a minimum.

THE DEFENDANT: Wait a minute.

THE COURT: The sentence is 14 to 28 years.

THE DEFENDANT: You said three and six for escape. That is consecutive too. I thought that was being run concurrent with the time. I signed the paper for that in Court. I signed the paper to plead guilty and that would be run concurrent with any sentence.

MR. MACVEIGH: I think he may have.

MR. KELLEY: The agreement was that he plead guilty to that and it run concurrent with any charge.

THE COURT: If that was the agreement, then the escape is to run concurrent.

MR. KELLEY: The effect would be 11 to 22.

THE COURT: If that was the deal, that was the deal.

\* \* \*

O R D E R (Cont'd.)

We amend the order so that the sentence on the escape charge is to run concurrent and not consecutive to all of the other sentences imposed.

\* \* \*

THE DEFENDANT: I want to know if there is anyway I can have a copy of the my pre-sentence investigation and I copy of the Court Order of my sentence.

THE COURT: A copy of the sentencing colloquy will be provided to your counsel. and I'll instruct Mr. MacVeigh to make a copy and give it to you as well. You have the pre-sentence as

well.

MR. MACVEIGH: I do, Your Honor. If you direct I'll be happy to give him a copy but beyond that the rules of criminal procedure forbid that.

THE COURT: I direct that you provide him a copy of that.

\* \* \*

kmb





IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

Criminal Division

COMMONWEALTH OF PENNSYLVANIA : No. 2341 Criminal Action 1992

vs. :

Calvin W. Roth, Jr. :

: Escape, Rape, Terroristic  
: Threats

PETITION FOR RECONSIDERATION OF SENTENCE

To the Honorable, the Judges of the said Court:

And Now comes, Calvin W. Roth, Jr., petitioner and defendant in the above matter by his attorney, J. David MacVeigh, and respectfully represents:

1. That the petitioner was sentenced on September 2, 1993, by the Court to undergo imprisonment in a state correctional institution for not less than 10 nor more than 20 years on the charge of Rape, not less than 1 nor more than 2 years on the charge of Terroristic Threats, and not less than 3 nor more than 6 years on the charge of Escape. The sentence on the Rape and Terroristic Threats charges were ordered to be served consecutively and the Escape charge was ordered to be served concurrently to the Rape and Terroristic Threats sentences.

2. That the sentence imposed by the Court violates Section 9721(b) of the sentencing code in that the sentence on the Rape charge is the upper limit of the aggravated range and also the maximum sentence for this offense and it was imposed without justification or explanation.

---

3. That the Court did not state sufficient legitimate reasons for imposing the maximum sentence on the Rape charge and for ordering that the Terroristic Threats sentence be served consecutively to the Rape sentence.

Wherefore, the defendant requests that the lower Court grant his request for reconsideration of sentence.

Respectfully submitted,

J. David MacVeigh  
J. David MacVeigh  
Assistant Public Defender



IN THE COURT OF COMMON PLEAS OF YORK COUNTY,

PENNSYLVANIA

COMMONWEALTH	: No. 2341 CA 1992
	:
VS	:
	:
CALVIN ROTH	: [RECONSID. SENTENCES]

York, Pa., Thursday, September 30, 1993

Before The Honorable John H. Chronister, Judge

APPEARANCES:

WILLIAM H. GRAFF, Esquire  
Assistant District Attorney  
For the Commonwealth

J. DAVID MACVEIGH, Esquire  
Assistant Public Defender  
For the Defendant

\* \* \*

MR. GRAFF: This is Commonwealth of Pennsylvania versus Calvin Roth, 2341 of '92, charge is rape and terroristic threats. This is the time and date scheduled for a motion on reconsideration of sentence since the Court refused Mr. Kelley's motion for continuance this morning.]

THE COURT: Mr. MacVeigh.

MR. MACVEIGH: Your Honor, just so the record is clear, the last -- last time Mr. Roth appeared at sentencing, I was directed to provide him a copy of the pre-sentence report. I copied my copy of that this morning and gave it to him. I think I was also directed to give him a copy of the colloquy conducted when he pled guilty I think just prior to trial to the offense of escape; and as far as I know, at least I don't have a copy of that colloquy. I don't think it's been transcribed, so I cannot give him that.

Your Honor, I filed this at Mr. Roth's direction. Just minutes ago I suggested to him that I myself am a little bit reluctant to pursue it; but he wanted me to, so I'll let him address the

Court.

THE COURT: Very well.

MR. MACVEIGH: Say anything you want, Calvin.

THE DEFENDANT: I don't know what to say.

THE COURT: Sorry. I can't hear you.

THE DEFENDANT: I'm thinking what I want to say. I don't got noting to say. He don't -- he not telling me anything right. I don't know. He's the one that filed it for me. I asked him -- because I asked to have it filed.

I mean I got sentenced 10 to 20 years for something I still didn't even do; and I ain't going to change my agreement on that but I'm just saying.

THE COURT: For purposes of the motion and for this argument --

THE DEFENDANT: Yeah.

THE COURT: You can't discuss whether you're guilty or not.

THE DEFENDANT: Okay, well --

THE COURT: The question today assuming you are guilty, what would an appropriate sentence be? Now as far as disputing whether you're guilty or not, you still have the right to appeal the jury's decision and Mr. MacVeigh will still follow through on that. But the purposes of today's hearing is to establish if the Court made any legal mistakes in regard to your sentencing, if an improper sentence was imposed accepting as fact that you were guilty based on the jury's verdict.

MR. MACVEIGH: Your Honor, I don't wish to belittle the serious nature of the offense; but I think we should consider here if we could for a minute the lack of physical harm that was done the victim.

Arguably there was psychological harm done to her and unquestionably Mr. Roth has a maximum prior record score; but to have sentenced him to the absolute maximum that he could have received even above the aggravated range without any physical injuries to her, I think the Court failed to take that into consideration.

THE COURT: All right.

\* \* \*

O R D E R

The request to reconsider sentence is refused. We'll concede Mr. MacVeigh is

correct in stating that there were not serious physical injuries; however there were serious psychological injury shown to the victim as shown by her reactions in the courtroom. In addition, the offense was committed at a time when the Defendant was still technically incarcerated, and also the Defendant's prior record such and even his conduct after he escaped included another violent crime after that time. So taking all those factors into account, they clearly outweigh the lack of actual physical injury; and we believe that the maximum sentence imposed was appropriate. Therefore, the petition to reconsider sentence is refused.

\* \* \*

THE COURT: You still have the right to appeal the jurys decision. Mr. MacVeigh will follow through on that appeal.  
aln, 10/14/93



Oct 4,  
1993

IN THE SUPERIOR COURT OF PENNSYLVANIA  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA :  
VS. : DOCKET#: 2341-CA-1992  
CALVIN W. ROTH, JR. : OTN: C 842677-3  
Appellant :

MOTION FOR JUDGMENT OF ACQUITTAL NOT WITHSTANDING  
THE VERDICT OF A NEW TRIAL

TO THE HONORABLE JUDGES OF THE SUPERIOR COURT:

This Motion by the appellant, Calvin W. Roth, Jr.  
respectfully represents the following:

1. That he is the appellant in the above-captioned matter.
2. The following facts are the grounds for this action by  
the appellant.

I. Counsel for the appellant during the trial in  
the York County Court of Common Pleas was ineffective in the  
representation of the appellant, in that;

a) Counsel failed to object to the alleged victims  
blatant out-burst while on the witness stand, which was a  
tactic used by the prosecution to sway the jury. Alleged victim  
was removed from the courtroom for a period of three minutes then  
placed, immediately, placed, back on the witness stand.

b) Counsel failed to enter into evidence testimony  
(written and notarized) by key witness for the appellant.

c) Counsel failed to submit a request for polygraph  
testing of both the appellant and alleged victim, as requested  
by the appellant.



II. Verdict was against the weight of the evidence, in that;

a) Prosecution failed to present any documented medical reports supporting the alleged rape.

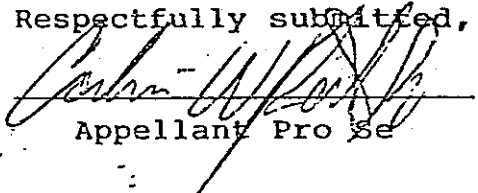
b) Verdict, lacked any physical proof, scares, bruises or any other physical evidence to support the verdict.

c) There were various inconsistencies in the testimony of the alleged victim.

d) Conviction obtain through prosecutorial misconduct, prosecution acted as "a vindictive seeker for vengeance."

Wherefore, the appellant, Calvin W. Roth, Jr., moves this court to grant this appeal and render a final decision upon the review of the appellant's supporting brief.

Respectfully submitted,

  
Appellant Pro Se

cc: file



IN THE SUPERIOR COURT OF PENNSYLVANIA

HARRISBURG DISTRICT

Commonwealth of Pennsylvania	:	No.	Harrisburg 1993
	:	No.	2341 Criminal Action 1992
vs	:	Escape	
	:	Rape	
Calvin W. Roth	:	Terroristic Threats	

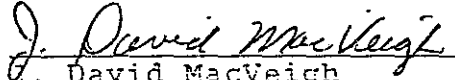
PETITION TO REMAND TO COURT OF COMMON PLEAS

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

1. Petitioner is J. David MacVeigh, who was appellant's counsel at trial.
2. Following denial of post-trial motions an appeal to this court was filed September 24, 1993.
3. On October 4, 1993 counsel learned that appellant had filed a pro se "Motion for Judgment of Acquittal Not Withstanding (sic) the Verdict of a New Trial" (sic) a copy of which is attached and marked as Exhibit "A".
4. Appellant's pro se motion refers to three examples of alleged ineffectiveness by trial counsel.
5. For trial counsel to continue to represent appellant would be a conflict of interest.
6. A copy of appellant's pro se motion is attached and marked as Exhibit A.

Wherefore, counsel requests that this case be remanded to the trial court for appointment of new counsel to pursue any possible remedies deemed necessary.

Respectfully submitted,

  
J. David MacVeigh  
Assistant Public Defender



IN THE SUPERIOR COURT OF PENNSYLVANIA  
SITTING AT HARRISBURG

COMMONWEALTH OF PENNSYLVANIA

v.

CALVIN W. ROTH

:  
:  
:  
:  
:  
:

No. 711 Harrisburg 1993

O R D E R

AND NOW, to-wit, this 5th day of November, 1993, upon consideration of appellant's petition for remand filed in the above-captioned matter, the same is hereby GRANTED. IT IS HEREBY ORDERED that the matter be remanded to the Court of Common Pleas of York County for the appointment of new counsel.

PER CURIAM



*Kelly*  
*file*

The Superior Court of Pennsylvania  
Office of the Prothonotary

434 MAIN CAPITOL BUILDING  
HARRISBURG, PENNSYLVANIA 17108

DAVID A. SZEWCZAK, ESQUIRE  
PROTHONOTARY

(717) 787-6

M E M O R A N D U M:

DATE: November 5, 1993

TO: John David MacVeigh, Asst. P.D. *PM*

FROM: Patricia A. McKeever, Chief Clerk  
Superior Court of PA - Harrisburg District

RE: Commonwealth v Calvin W Roth, Jr  
No. 711 Harrisburg, 1993

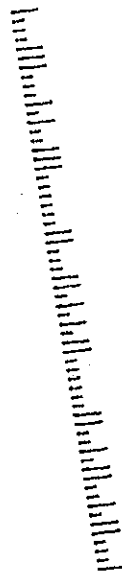
This is to advise that the attached Order has been entered  
in the above-captioned matter.

/eh  
Attachment

cc: Hon. John Chronister  
Thomas H. Kelley, Esquire  
Clerk of Court, York Co. (2341 CA 1992)

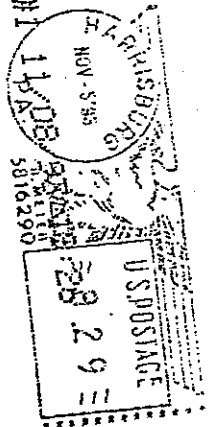
Prothonotary's Office  
Superior Court of Pennsylvania  
P. O. BOX 624  
HARRISBURG, PENNSYLVANIA 17108

17401-1501 04



Thomas H. Kelley  
District Attorney's Office  
York County Courthouse  
28 E. Market St.  
York, PA 17401

HEG.PA 170 155#1







IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

Criminal Division

Commonwealth of Pennsylvania: No. 2341 CA. 1992

vs

Calvin W. Roth

: Escape  
: Rape  
: Terroristic Threats

ORDER

AND NOW, TO WIT, this 1<sup>ST</sup> day of December, 1993, it is hereby ordered that Frank Arcuri, Esq., is appointed to represent the above captioned defendant, Calvin W. Roth, in all pending criminal actions with the costs to be borne by the County of York.

BY THE COURT.

John H. Chromster  
Judge

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA  
Criminal Division

Commonwealth of Pennsylvania : No. 2341 CA. 1992

vs

Calvin W. Roth

: Escape  
: Rape  
: Terroristic Threats

PETITION TO APPOINT COUNSEL

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

The petition of J. David MacVeigh, Assistant Public Defender respectfully represents:

1. Following the trial on July 21, 1993, the defendant was convicted and on September 2, 1993 was sentenced to serve 11 to 22 years.
2. Post-trial motions were argued and denied on August 19, 1993.
3. The defendant, acting pro se, sent a document entitled "Motion For Judgement of Acquittal Not Withstanding (sic) the Verdict of a New Trial" (sic) to the court.
4. An appeal to the Superior Court was filed on September 24, 1993.
5. Counsel learned of this document on October 4, 1993.
6. The document alleges several instances of counsel's ineffective assistance.
7. The document should be treated as a petition under the PCRA and new counsel should be appointed for the defendant.
8. The Superior Court has remanded this to the Court of Common Pleas to proceed on the Post Conviction Relief Act Petition.



Commonwealth of Pennsylvania  
YORK COUNTY, ss.

In The Court Of Common Pleas  
Criminal Division Of York County

To David MacVeigh, Esquire, York County Public Defender's Office, York, PA

PCCR HEARING - APPEAR WITHOUT FURTHER NOTICE  
Please disregard subpoena for hearing dated 3/28/94)

are hereby required that setting all business and excuses aside, you be and appear in your proper person before the Judges of the COURT OF COMMON PLEAS - CRIMINAL DIVISION, to be held during the term of ~~XXXXXX~~ on Tuesday, April 12, 1994 ~~XXXXXX~~ CR #7 at 1:30PM to test the truth according to your knowledge in a certain Criminal Action No. 2341 CA 1992 before our said Court before the Judges thereof, undetermined and then and there to be tried between the Commonwealth and CALVIN W. ROTH, JR., Defendant, ON PART OF THE COMMONWEALTH. I this YOU ARE NOT TO OMIT under the penalty of law, and you shall be and appear in said Court each and every day until the conclusion of said case.

WITNESS the Judges of said Court, at York, February 24, 1994

ON RECEIPT OF THIS SUBPOENA, YOU SHOULD IMMEDIATELY CONTACT THE DISTRICT ATTORNEY'S OFFICE AT (717) 771-9600. YOU WILL BE NOTIFIED OF THE SPECIFIC DATE ON WHICH YOUR CASE IS SCHEDULED FOR TRIAL.

*Marlyn J. Hoff*  
CLERK OF COMMON PLEAS CRIMINAL DIVISION

CLERK OF COURTS



IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

VS

Calvin Roth

: No. 2341 Criminal Action 1992  
:  
:  
:  
:

O R D E R

The Court scheduled a Post Conviction Relief Act hearing for May 31, 1994 on the defendant's Post Conviction Hearing Act Petition. However the defendant is presently serving a sentence in the State of Indiana. The Commonwealth requested temporary custody of the defendant for purposes of the hearing. The State of Indiana has refused to grant this request. Indiana contends that if they would consent, they would lose their jurisdiction under the Interstate Agreement On Detainers. Since the State of Indiana will not release the defendant, the hearing on the Post Conviction Relief Act Petition is hereby continued generally until such time as the defendant finishes serving his Indiana sentence, and can be brought back to York on the Pennsylvania detainer. That exact date is uncertain. The defendant shall advise the Court in writing at the time he is brought back to Pennsylvania so that a date for the hearing may be scheduled.

BY THE COURT,

*John H. Chronister*  
JOHN H. CHRONISTER - JUDGE

DATE: *June 16, 1994*





J.S61015/95

COMMONWEALTH OF PENNSYLVANIA,  
Appellee

v.

CALVIN W. ROTH, JR.,  
Appellant

IN THE SUPERIOR COURT  
OF PENNSYLVANIA

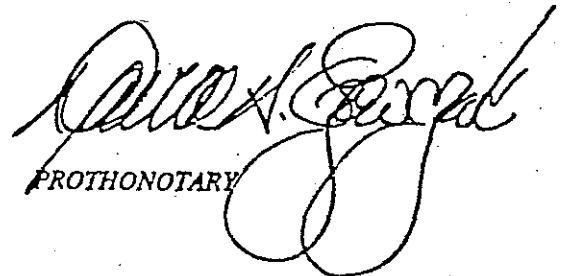
No. 711 Harrisburg 1993

Appeal from the judgments of sentence entered  
September 2, 1993, in the Court of Common Pleas  
of York County at No. 2341 CA 1992.

**J U D G M E N T**

*ON CONSIDERATION WHEREOF, it is now here ordered and  
adjudged by this Court that the judgment of the Court of  
Common Pleas of YORK County be, and the same  
is hereby AFFIRMED.*

BY THE COURT:

  
PROTHONOTARY

Dated: Dec. 14, 1995

J.S61015/95

COMMONWEALTH OF PENNSYLVANIA, : IN THE SUPERIOR COURT  
Appellee : OF PENNSYLVANIA  
:   
v. :   
:   
CALVIN W. ROTH, JR., :   
Appellant : No. 711 Harrisburg 1993

Appeal from the judgments of sentence entered  
September 2, 1993, in the Court of Common Pleas  
of York County at No. 2341 CA 1992.

BEFORE:

MEMORANDUM:

**FILED DEC 14 1995**

This appeal is from the judgments of sentence entered by the Court of Common Pleas of York County (Chronister, J., presiding). On July 21, 1993, following a jury trial, appellant, Calvin Roth, was convicted of rape,<sup>1</sup> terroristic threats,<sup>2</sup> and escape.<sup>3</sup> Thereafter, he was sentenced to an aggregate term of eleven to twenty-two years incarceration. Appellant now presents one issue: whether the trial judge erred in refusing to grant a mistrial after an emotional outburst by the victim during her testimony.

The underlying facts of this case are not in dispute. Appellant was charged with the rape of the victim after he allegedly assaulted her while both were patients at an in-patient drug and alcohol treatment center.

At trial the Commonwealth presented the victim as its principal witness. During her testimony the Commonwealth's attorney asked the

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<sup>1</sup> 18 Pa.C.S. §3121.

<sup>2</sup> 18 Pa.C.S. §2706.

<sup>3</sup> 18 Pa.C.S. §5121.

J.S61015/95 - 2

victim to describe the incident. During that description appellant's attorney asked for a bench conference. The trial judge granted a sidebar discussion during which the following exchange occurred.

MR. MACVEIGH:

Judge, I suppose the record will reflect that the witness is really now sobbing rather heavily, and Mr. Kelley gave her a glass of water. That hasn't calmed her down much. I'm going to have to ask for a recess. In fact, she's being helped out right now by the D.A. victim witness coordinator. I'd ask for a mistrial.

THE COURT:

We'll take a brief recess to have her compose herself. We will oppose the Defendant's request for mistrial.

Following this exchange the judge addressed the jury thusly:

THE COURT:

Ladies and gentlemen we will take a brief recess to allow the witness to compose herself.

N.T. Trial Transcript p. 31. Thereafter, a recess was taken; after the recess the victim continued testifying. The victim finished her testimony without further incident.

It is appellant's position here that the trial judge erred in refusing his attorney's request for a mistrial. In support of this position he relies on the cases of Commonwealth v. Buzard, 365 Pa. 511, 76 A.2d 394 (1950), and Commonwealth v. Flood, 302 Pa. 190, 153 A. 152 (1930). These cases do not provide sufficient support to sustain appellant's position, and we affirm the judgments of sentence entered by the trial court.

In Buzard, supra, the appellant/defendant claimed that the trial court erred in refusing a mistrial when the victim's widow

J.S61015/95 - 3

allegedly "cried audibly before the jury" while she was identifying her husband's cap. The Supreme Court did not address the issue of jury prejudice since it concluded that the trial record did not support appellant's characterization of the widow's behavior.

In Flood, supra, the issue presented to the Court was whether the Commonwealth, in the course of a homicide prosecution, erred in calling the deceased victim's father to the stand to identify the clothing worn by the victim. The Court held that there was a legitimate reason for the introduction of this evidence. Thereafter, in dicta, the Court noted that while "there is no known rule of law that will prevent a relative from outbursts of grief while on the witness stand testifying in the case to material matter; courts should, when necessary, handle such situations with a stern hand, and in the interest of justice it (sic) should summarily order a new trial, if the jury is, in the opinion of the court, swayed by such conduct. Id. at 197, 153 A. at 154 (emphasis supplied):

This language, though in the form of dicta, is nonetheless an accurate summation of the law. However, it provides no relief to appellant; for it merely emphasizes that it is the trial court, in the first instance, which is charged with evaluating the seriousness of the conduct and its effect on the jury.

In the case of Commonwealth v. Evans, 465 Pa. 12, 348 A.2d 92 (1975), the Supreme Court was reviewing a situation which was more analogous to the case at hand. There the daughter of a homicide victim was called to testify as a Commonwealth witness. She began

161015/95 - 4

eping (described in the opinion as "very soft crying") during her testimony. The trial court "declared a short recess in order to rmit [the witness] to regain her composure." The Supreme Court und no error in the manner in which the trial judge handled the tter, or in his conclusion that the jury was not "swayed":

We cannot say that the trial court, which of course observed the episode was wrong in believing that the jury had not been swayed because the incident was of minimal impact or that the Court abused its discretion in denying the motion for a mistrial. [citation omitted].

1. at 18, 348 A.2d at 95.

In the present case the trial judge, when faced with the post-trial challenge to his refusal to grant a mistrial, stated "[i]t was all within the court's discretion to ... take a brief recess, allow the victim to compose herself and to return to the witness stand."

1.T. Post-Trial Hearing p. 3.<sup>4</sup>

It is apparent from the quoted remarks that the judge did not consider the victim's conduct to be such as to improperly influence (or "sway") the jury. Moreover, our own review of the transcript does not give us reason to doubt the trial judge's conclusion. A single episode of emotion exhibited during the course of a rape victim's testimony cannot be said to warrant a mistrial; indeed, given the traumatic event about which the victim is called upon to testify, and the public forum in which the testimony is offered, some degree of emotion is to be expected. It is left to the trial court to monitor this conduct and to evaluate its effect; and that

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<sup>4</sup> These are the only comments on the record regarding this issue. The trial judge's opinion on appeal was addressed to clarifying the procedural aspects of appellant's direct appeal versus a pro se post-conviction proceeding.

J.S61015/95 - 5

determination will not be upset unless there has been a "flagrant abuse of discretion". See Commonwealth v. Dumas, 299 Pa.Super. 335, 344, 445 A.2d 782, 787 (1982). We detect no such abuse in this case.

Accordingly, the judgments of sentence are affirmed.



IN THE COURT OF COMMON PLEAS OF YORK COUNTY,  
PENNSYLVANIA

COMMONWEALTH	:	No. 2341 C. A. 1992
	:	
VS	:	1) Escape
	:	2) Rape
CALVIN WILLIAM ROTH, JR.	:	3) Terroristic Threats

York, Pa., Tuesday, January 30, 1996

Before the Honorable John H. Chronister, Judge

APPEARANCES:

THOMAS H. KELLEY, Esquire  
Assistant District Attorney  
For the Commonwealth

FRANK C. ARCURI, Esquire  
For the Defendant

TRANSCRIPT OF PROCEEDINGS

Reported by:

Debra S. Romesberg,  
Official Court Reporter



INDEX TO WITNESSES

	<u>DIRECT</u>	<u>CROSS</u>	<u>R-D</u>	<u>R-C</u>
<u>FOR THE DEFENDANT:</u>				
Calvin W. Roth, Jr.	2	27	--	--
<u>FOR THE COMMONWEALTH:</u>				
J. David MacVeigh	43	50	--	--
<u>IN REBUTTAL:</u>				
Calvin W. Roth, Jr.	58	62	--	--

INDEX TO EXHIBITS

	<u>MARKED</u>	<u>ADMITTED</u>
<u>FOR THE COMMONWEALTH:</u>		
No. 1 - Letter	34	--

1 (PROCEEDINGS HELD ON TUESDAY, JANUARY 30, 1996)

2 \* \* \*

3 MR. KELLEY: Good afternoon, Your  
4 Honor.

5 THE COURT: Good afternoon.

6 MR. KELLEY: Your Honor, this is the  
7 time scheduled for the hearing of Commonwealth versus  
8 Calvin William Roth, Jr., 2341 Criminal Action of  
9 1992. Defendant is charged with escape, rape, and  
10 terroristic threats. We are here on Defendant's PCRA  
11 allegations, Your Honor.

12 MR. ARCURI: Your Honor, if I could  
13 have just a minute?

14 THE COURT: Sure.

15 MR. ARCURI: Your Honor, Mr. Roth --  
16 if I may state for the record, Mr. Roth had been in  
17 Indiana serving a sentence there. I recently simply  
18 happened upon him in the York County Prison last  
19 Thursday when I requested that this particular  
20 hearing be held. I discussed the situation with him  
21 then, and I went back and met with him again on  
22 Sunday.

23 He has now brought me the names and  
24 phone numbers of two witnesses that he would like to  
25 have testify in his behalf. I'm going to have him

1 testify as to what he thinks they would say, after  
2 which if their testimony would be relevant, I would  
3 like to have some time to converse with these people  
4 myself and see if their testimony would be relevant.

5 Mr. Kelley has indicated he feels he's  
6 probably unprepared. I don't know how Your Honor  
7 wishes to handle this. I instructed Mr. Roth as to  
8 how I think the hearing should be handled at this  
9 point, and that Mr. MacVeigh can then testify, and if  
10 we wish to continue it to see what's going on with  
11 these other witnesses --

12 THE COURT: I'll listen to what his  
13 offer is and what they would say whether it's  
14 relevant or not, and I'll make a decision whether to  
15 grant additional time at a later date.

16 MR. ARCURI: Okay. Take your  
17 paperwork.

18 \* \* \*

19 CALVIN WILLIAM ROTH, JR.,  
20 called as a witness, having been duly sworn according  
21 to law, testified as follows:

22 DIRECT EXAMINATION

23 BY MR. ARCURI:

24 Q Will you state your name.

25 A Calvin William Roth, Jr.

1 Q How old are you, Mr. Roth?

2 A Thirty-two.

3 Q Mr. Roth, where do you now reside?

4 A At the York County Prison.

5 Q Okay. And are you under sentence?

6 A Yes, I am.

7 Q When were you sentenced, do you recall?

8 A July -- I think it was September 2nd.

9 Q Of what year?

10 A Of '93.

11 Q And were you sentenced by Judge

12 Chronister?

13 A Yes, I was.

14 Q How much time were you sentenced to serve?

15 A Ten to twenty on rape, one to two on  
16 terroristic threats, and three to six on escape,  
17 escape running concurrent with the ten to twenty.

18 Q So all together you're running a sentence  
19 of 11 to 22 years?

20 A Eleven to twenty-two years.

21 Q For a period of time you were in Indiana,  
22 is that correct?

23 A Yes.

24 Q And why were you in Indiana?

25 A Serving for aggravated assault.

1 Q And are you now finished with that  
2 sentence?

3 A Yes, I am. I still owe them two years  
4 probation.

5 Q And that's merely a prelude to get to  
6 this point. You have been out of the state  
7 continuously since from that time that you were  
8 sentenced until now, is that correct?

9 A Yeah.

10 Q And this is the first opportunity we've  
11 had to conduct this hearing?

12 A Yes.

13 Q Who represented you at trial, Mr. Roth?

14 A David MacVeighn (sic).

15 Q David MacVeigh?

16 A Yeah, David MacVeigh.

17 Q And was he privately retained or was he a  
18 Public Defender?

19 A Public Defender.

20 Q Do you recall meeting with Mr. MacVeigh  
21 after your arrest?

22 A Yes, I do.

23 Q And how soon after your arrest was that?

24 A I think it was about a month. About a  
25 month I seen him afterwards.

1 Q Was he the only Public Defender you saw?

2 A Yes.

3 Q Did you indicate to him at that time that  
4 you -- did you indicate to him that you were guilty  
5 or not guilty?

6 A Not guilty.

7 Q And did you indicate to him early on that  
8 you intended to take this matter to trial?

9 A Yes, I did.

10 Q And did you and Mr. MacVeigh meet any  
11 number of times after that and before trial?

12 A Twice.

13 Q Twice?

14 A That I remember I can recall twice.

15 Q What did you tell him that your defense  
16 was?

17 A That it was consented sex with the victim.  
18 That I never raped her.

19 Q Do you admit having sex with her?

20 A Yes.

21 Q But the sex was consensual?

22 A Yes, it was.

23 Q Did you indicate to Mr. MacVeigh whether  
24 or not you had any witnesses to support that?

25 A Yes, I told him that I had three different

1 witnesses.

2 Q Okay. Do you recall the identity of those  
3 witnesses?

4 A One of them is Maureen. You got the  
5 address. Maureen.

6 Q You just gave me this list five minutes  
7 before this hearing, is that correct?

8 A Yeah.

9 Q The one name is Maureen McPartland at 7459  
10 Thunderbird Road, Liverpool, New York?

11 A Yes.

12 Q Did you give Mr. MacVeigh that name prior  
13 to your trial?

14 A Yes, I did.

15 Q And also the name of Walter Gladstone?

16 A Yes.

17 Q And you have here that his place of  
18 employment is Colonial House?

19 A Well, at the time he was working for  
20 Colonial House. Now he's not working. I don't know  
21 where he's working at. I couldn't tell you where  
22 Maureen is at either. I know that's her family's  
23 address. And Walter he was here in my trial last  
24 time.

25 Q Now, you indicate that you sent a letter

1 to that effect to Mr. MacVeigh on August 2nd of '93?

2 A Yes.

3 Q Was that before or after the trial?

4 A That was after the trial -- that was  
5 before the trial.

6 Q That was before the trial?

7 A Excuse me.

8 Q Did you ask him to have these people  
9 subpoenaed?

10 A Yes, I did.

11 Q Had you spoken with them regarding what  
12 their testimony might be?

13 A I did talk to Maureen.

14 Q When did you speak with her?

15 A That was -- that was like after they -- a  
16 week after I got here to York County when they  
17 arrested me.

18 Q How did you get to speak with her?

19 A Talked to her on the phone.

20 Q And did she indicate she could testify  
21 favorably for you?

22 A She told me that she would do anything  
23 that she could do to help me in my trial so the truth  
24 would come out.

25 Q Did she have some kind of personal



1 knowledge about this sexual interlude that you had  
2 with the victim?

3 A She knew that there was a relationship  
4 between me and her, me and the victim, that she  
5 wasn't scared of me, that we was pretty good friends  
6 at the time, and she's a witness to the fact that  
7 when this incident was suppose to be taking place and  
8 it was over with that the victim turned around and  
9 was standing in the hallway talking to me. And me  
10 and the two -- the other two people, Maureen was one  
11 of them, and another one is another person, right,  
12 talking and laughing at the same time after this  
13 incident was suppose to -- after it was taking -- I  
14 mean over, when it was over with. She -- I mean she  
15 didn't seem like she was scared at me or anybody  
16 else.

17 Q And Mr. Gladstone, had you had any  
18 discussions with him as to whether or not he would  
19 testify?

20 A Yeah, he came out here to visit me, and he  
21 left me a letter with a picture that he brought in  
22 that he was going to mail, but he didn't know the  
23 address.

24 Q Okay. When you say here, where do you  
25 mean?

1 A Out to the Adams County Jail.

2 Q Adams County?

3 A I mean York County Prison.

4 Q This was before trial?

5 A Yeah.

6 Q And did he indicate that he could somehow  
7 give testimony?

8 MR. KELLEY: Objection, hearsay, Your  
9 Honor.

10 MR. ARCURI: Your Honor, it's not  
11 presented for the purpose of hearsay. It's simply to  
12 give the Court some reason to see whether or not --

13 THE COURT: I understand. I'll permit  
14 the matter to be gone into.

15 MR. ROTH: He came to tell me that he  
16 had pictures with me and the victim taking pictures,  
17 and it states in my records that these pictures was  
18 taken a week before the incident. These pictures was  
19 taken at least a month before the incident.

20 Q And what would those pictures have shown?

21 A It's a picture of me and her standing  
22 together smiling, right, and holding each other, and  
23 it says in my paperwork that it's policy that we hug  
24 each other every day. Yes, we hug each other every  
25 day when I was in the Colonial House, but we hug at

1 group time, right, not all through the day. And the  
2 picture is -- I mean we are smiling. We are friends.  
3 Me and this victim was pretty close. There's a lot  
4 that wasn't said at the time of my trial.

5 Q Now, were those the only two witnesses  
6 whose names you gave to Mr. MacVeigh?

7 A No, there's another one I gave him -- to  
8 him. His name was Christian, but I can't -- I don't  
9 know -- remember his last name. He was a client at  
10 the Colonial House too.

11 Q Was he a client there at the time --

12 A Yes.

13 Q -- that this matter went to trial?

14 A Yes.

15 Q Okay. So again your statement is that you  
16 did divulge this particular individual to Mr.  
17 MacVeigh?

18 A Yes, I did.

19 Q From what happened at trial and your  
20 discussion with Mr. MacVeigh do you know -- do you  
21 recall whether or not any of these people were  
22 subpoenaed and brought in to testify?

23 A Well, to my recollection everybody was  
24 subpoenaed, but only one showed up.

25 Q So you're saying Mr. MacVeigh did issue

1 subpoenas to them?

2 A Yes, he did.

3 Q Who showed up to testify?

4 A Walter Gladstone.

5 Q And did he testify?

6 A Yes, he did.

7 Q Do you know why the other two didn't show?

8 A Well, David came out to see me. That was  
9 the second time he came out to see me. This is  
10 before the trial, told me that he talked to the  
11 witnesses, and he said that their testimony would be  
12 irrelevant to my case, that it wouldn't really do  
13 anything to help me.

14 Q Okay.

15 A And I figure -- to me I figured that, you  
16 know, it would help me out.

17 Q Okay. Did you order him to have those  
18 people come in?

19 A I asked him why they wasn't here. He said  
20 that they sent a statement or a paper. I seen the  
21 paper one time. I asked for a copy of it, and from  
22 this day I ain't got no copy of it.

23 Q What I'm asking did you order him to have  
24 those people here?

25 A Yes, I did.

1 Q Do you know if any effort was made to have  
2 them personally attached to be brought in after their  
3 subpoenas were served?

4 A I do not know that.

5 Q Okay. How was your trial conducted?

6 A Not to my -- not the way I thought it  
7 would go. It was not -- it wasn't done the way I  
8 thought it would be done.

9 Q Were any offers to settle this matter, to  
10 plead guilty to some lesser time or some lesser  
11 charge, was anything like that communicated to you?

12 A I asked Mr. David MacVeigh if everything  
13 went the way it was suppose to go, right, in the  
14 trial and the truth did come out; how much time would  
15 I be facing. He told me 6 and a half to 13 years.  
16 Then after the trial I wind up getting 11 to 22  
17 years.

18 Q Would it have made any difference to you  
19 if you would have known you were getting --

20 A No, it wouldn't because I would have still  
21 turned it around and took it to a jury trial.

22 Q Okay. What specifically -- you got to  
23 tell the Judge this now. What do you think that Mr.  
24 MacVeigh did incorrectly in representing you?

25 A Well, one is when they put the victim on

1 the stand and the victim turned around and went  
2 hysterical, right, and then they turned around and  
3 called for a recess, and he didn't reject.

4 Q You mean object?

5 A Object to it, right, and they was asking  
6 the victim questions, and she turned around and acted  
7 like somebody was trying to hurt her or kill her in a  
8 way, and they turned around and called for a recess.  
9 He didn't reject on the part that it should have been  
10 recalled to the Judge's attention that after the  
11 recess, they came back in. They asked her the same  
12 questions, and she's talking like I am right now like  
13 nothing ever happened.

14 Q What else do you have complaints with in  
15 the way your trial was handled?

16 A That I asked David MacVeighn (sic) to  
17 do -- I asked him for why didn't I get a lineup, and  
18 he said there was no call for it because at the time  
19 I did not look the same as I did when I was at the  
20 Colonial House. I turned around at the Colonial  
21 House. I weighed 245 pounds in the picture that was  
22 shown at the trial. It shows you how big I was. At  
23 this time I might have weighed 160 pounds. That's  
24 how much weight I lost. I did not look the same. I  
25 had brown hair at the Colonial House and no beard.

1 At this time I had blond hair and a red beard.

2 Q Mr. Roth, how would a lineup have helped  
3 your case if your defense was --

4 A Because at the magistrate's office when I  
5 walked in the magistrate's office, instead of the  
6 victim turning around and actually know who I am, Mr.  
7 Tom Kelley turned around and said, This is Mr. Roth,  
8 Calvin W. Roth, Jr.

9 Q Who did he say that to?

10 A He turned around and pointed to me and  
11 then pointed the victim -- asked the victim if it was  
12 me. The victim said, yes. So there was no way I  
13 could turn around. The victim didn't even remember  
14 what I looked like. I don't really know if she knew  
15 what I looked like or didn't know what I looked like,  
16 but I didn't have that chance.

17 It was another thing. I asked for a  
18 lie detector test, a polygraph test done on me and  
19 the victim, right. David MacVeigh said there ain't  
20 no use for that to me. I figured there was. Even  
21 though you can't use it, it just still tells the  
22 truth 99 percent of the time, and I wanted it done  
23 and never had it done.

24 Q How soon after the incident occurred did  
25 this scene take place at the district justice's

1 office?

2 A Excuse me?

3 Q Okay. You said you had an incident at the  
4 district justice's office where you were brought in  
5 and Mr. Kelley pointed to you and said, That's him.

6 A Yeah.

7 Q Okay. How soon after the incident at the  
8 Colonial House did that take place?

9 A Oh, this was when I was at the Colonial  
10 House when this incident went down. I turned around  
11 after they told me that the victim said that I raped  
12 her, I was accused, I turned around. They took me to  
13 a office. I turned around after they told me, the  
14 director, Marvin Lipscomb, I turned around and sat in  
15 the rec area for about a minute, and I left. I ran.

16 Q How long were you gone?

17 A From the 25th of May to January -- I mean  
18 July 10th they turned around and got me in Indiana.

19 Q And you're saying in the meantime your  
20 appearance had changed?

21 A Yeah, it did. I mean I died my hair blond  
22 so I wouldn't be mistaken, and my beard grew out by  
23 that time. And from me working in the sun, cause I  
24 did have a job at the time, my beard turned red. I  
25 was in the sun almost all the time. My hair was



1 mostly blondish red you might as well say.

2 Q Now, you say Mr. MacVeigh did tell you  
3 that the polygraph could not be used, but you wanted  
4 one anyway?

5 A Right. He told me it wouldn't be -- he  
6 said it would hurt me more than it would help me.

7 Q Okay. Now, what else was done incorrectly  
8 during your trial, Mr. Roth?

9 A There wasn't no doctor. All there --  
10 there was no doctor. There should have been a doctor  
11 if the victim was raped. I did not see -- I seen --  
12 like I say I did see medical report, I guess a lab  
13 report of my saliva and blood test that was taken to  
14 prove that it was my semen inside her. I did see  
15 that, but that's the only thing I seen. I didn't see  
16 nothing else.

17 They said they had clothes in a box.  
18 I didn't see no clothes in a box. All I seen was a  
19 box. If the victim -- any rape paper. The victim  
20 said I raped her they -- I should have the right to  
21 have a doctor there to prove that she was raped, that  
22 she was forcibly raped, right. There was no such  
23 thing. There was no such doctor. They had one  
24 officer said on the stand and say this and this and  
25 that about the victim, how she looked, and how she

1 acted. Well, the victim when he turned around and  
2 seen her, she just came out of -- after a shower.  
3 Okay.

4 So any which way she said -- he said  
5 that she looked like she was beaten, battered, and  
6 she's hurt. If that's so, there was no bruises, no  
7 cuts, nothing on this victim. And they say she said  
8 that she had to loss -- I mean the victim said that  
9 she had to change her jobs. Well, she was at the  
10 Colonial House. How could she have a job. She was  
11 there going through treatment just like me.

12 Q Did you make any -- were there any other  
13 matters that you complained of with Mr. MacVeigh's  
14 conduct?

15 A They never -- I mean, okay, they said that  
16 she was -- okay, she said -- I mean -- okay. In the  
17 P.F.A. that they had I guess -- not the P.F.A. but I  
18 forget what they call it, it's when they have  
19 investigation done on the person like if they was  
20 doing it on myself to find my back history. I forget  
21 what it's called.

22 Q Presentence report?

23 A Yeah, that's it. That the victim stated  
24 that she was beaten, bruised, and she was badly hurt,  
25 which it states here I mean that they didn't have no

1 prior report to prove of scars, burns, bruises or  
2 anything like that on the victim. I mean they never  
3 showed no proof. The victim had nothing.

4 Q Okay.

5 A They never showed no ripped clothes,  
6 nothing.

7 Q Did Mr. MacVeigh argue --

8 A No, David MacVeigh didn't do nothing about  
9 it.

10 Q Did he argue that to the jury?

11 A No, not that I recollect, nothing.

12 Q Now, are there any other matters that you  
13 wish to bring to the Court's attention?

14 A Okay. Now, David did bring that up to the  
15 point -- I mean he did bring it up to the jury the  
16 point that there was no bruise and no cuts and  
17 nothing. He did bring that up, but I mean they went  
18 onto something else. Mostly his argument was, if I  
19 remember rightly, is that it was mostly about there  
20 was no bruises, no side effect, nothing like that.

21 Q Are those the only matters that you wish  
22 to bring to the Court's attention?

23 A Yeah. There's another thing that I still  
24 don't understand from this day. If the state side  
25 has a right to have the person or persons testify

1       against me to prove their case against me, I should  
2       have a right to turn around and say my side of the  
3       story, what happened in my defense.

4               Q       Didn't you testify during the trial?

5               A       I testified to what David MacVeigh asked  
6       me, the questions that he asked me, but he didn't let  
7       me -- I didn't get to say what I wanted to say about  
8       what happened on my side.

9               Q       Why not?

10              A       I don't know that. I still don't know  
11       that, why. I just -- he told me to do the questions  
12       that he asked -- answer his questions. So that's  
13       what I did. I thought I was doing it right. I don't  
14       know that much about the law. I don't.

15              Q       Well, what would you have said  
16       differently?

17              A       I would have told my side.

18              Q       Which is what?

19              A       Same as what happened that day.

20              Q       Yeah, Calvin, that's what I want to hear  
21       what you would have said differently?

22              A       Okay. What I'm trying to understand here  
23       is that you will -- you want me to say what happened?

24                      THE COURT: If you had had the chance  
25       to talk, what would you have said?

1 MR. ROTH: What would I have said.  
2 Well, on May 25th at 5 o'clock we all come down --  
3 I'm saying my side of what happened at the Colonial  
4 House, okay. At 5 o'clock we all come downstairs to  
5 go to eat. At 5:45 we all got done eating cause you  
6 couldn't leave the dining hall until 5:45.

7 After 5:45 that was our time in the  
8 Colonial House till we have group after that. That  
9 was like 6 o'clock. We had a group, and then by 6:30  
10 we are outside. We go out and smoke a cigarette  
11 outside because you ain't allowed to smoke inside the  
12 Colonial House.

13 Now, at 7:15 I was going -- they say I  
14 was going to a candlelight meeting, and a candlelight  
15 meeting is an A.A. meeting at nighttime. So at this  
16 time they say this incident happened around 6:30 to  
17 7:30. If that's so, we are all outside at 6  
18 o'clock -- I mean at 6:30, from 6 o'clock to 6:30.  
19 I can't see how any of that could have happened in  
20 less than 15 minutes from what the victim said that I  
21 did to her. It would have to take a lot more longer  
22 time than that.

23 So we are all outside, everybody  
24 leaves except me and her. We are sitting there all  
25 alone. Now, this is like quarter of 7, and we start

1 talking because me and Janet were pretty close, and  
2 the first thing she surprised me. She asked me to  
3 get her some greens, and greens is angle dust. It's  
4 what -- it can be angle dust sprayed with -- it could  
5 be -- it's hard to explain. Greens are homemade.  
6 It's home grown, but it's sprayed with bombing fluid.  
7 Can be sprayed with anything, but they call it  
8 greens.

9 Q Okay.

10 A Or flakes. But she asked me to get her  
11 some. I turned around, stood up, looked at her, and  
12 told her I don't do that stuff because that's why I'm  
13 here because I was there to get rehabilitated from my  
14 drug problem and alcohol problem. So I left.

15 On the way when I knew I -- it was  
16 time to go to the A.A. meeting, the candlelight  
17 meeting because they call 15 minutes to the van. So  
18 I go upstairs to turn around and get ready for this  
19 meeting, and when I go upstairs, she's already  
20 upstairs. I left her outside. She meet me up -- she  
21 beat me upstairs to that point.

22 Now, when I got upstairs, I went to my  
23 room, got my wash rag, toothbrush to clean up a  
24 little bit before we went to this meeting. When I  
25 come back around, she was standing at the door. She

1 called me. I know that I was breaking the rules when  
2 I went into her apartment, what I call them  
3 apartments, but it's her room cause below that  
4 elevator that's the girl's part, and then you got the  
5 guy's part.

6 Well, she was standing there at the  
7 door. She called me to her room. I went to her room  
8 cause I thought there was something that she was  
9 going to say or, you know, say that she was sorry  
10 cause she done it before then. I turned around.  
11 When I got there, I didn't turn around and throw her  
12 down or turn around and threaten to kill her or do  
13 this and do that to her. I mean she pulled me --  
14 excuse my language. She pulled me into the room

15 I went into the room. She was at the  
16 time -- she turned around and said -- she was sitting  
17 there writing a letter -- that she had something to  
18 say to me. She opened up her jacket and pulled her  
19 shirt up and showed me her tits.

20 Then after that she was on top of me  
21 on top of the bed. She said, I want you. I want  
22 you. I want this. I want that. I want you to make  
23 love to me. Next thing I know she's pulling her  
24 pants down. Okay. But after I was in jail for 17  
25 months, and I was in the jail for, excuse me, for 14

1 months in Adams County Jail. I came there for my  
2 last three months on a sentence, okay. As long as I  
3 was in jail I haven't been with a woman in awhile.  
4 So automatically, yeah, I'm excited, right. I'm  
5 aroused.

6 I turn and start taking my clothes off  
7 too, right. I pull my pants the same as she did,  
8 right. I turn around and starting making love to  
9 her. Only thing she said to me that she didn't want  
10 me to ejaculate inside of her. She started getting  
11 off. Next thing I'm telling her I was getting ready,  
12 and she said she don't matter. Let's go. Next thing  
13 I know she's getting off. I'm getting off, right.

14 This woman had no bruises, nothing,  
15 and she stated in -- on her behalf that I had my  
16 right knee and my left hand over -- I mean my right  
17 knee in her stomach, my left hand over her mouth, and  
18 ripping her clothes down. If that's so, I weigh 245  
19 pounds at the time. She weighed about 135 or 25. If  
20 that's so, the whole time that amount of weight on a  
21 person on her stomach especially above her pelvis is  
22 going to hurt her. It's going to bruise her. It's  
23 going to hurt her some way, right. She said she had  
24 nothing, no bruises, nothing on her when this went  
25 down.



1                   When it was all over, I got up, and I  
2                   told her, I said, Hey, I'm -- I told her that I was  
3                   sorry I ejaculated. She said, That's all right. I'm  
4                   going to take a shower. I left the room. She looked  
5                   out the room to make sure there was nobody in the  
6                   hallway. I went to my room after I got out of her  
7                   room, went to my room, and went and got the wash rag  
8                   and stuff cause I had left it there. I took it back  
9                   to my room before I went to her room and turn around  
10                  and went back down to the bathroom and cleaned myself  
11                  back up.

12                  When I came back down, Pat and  
13                  Maureen, two clients that were there at the rehab  
14                  asked me about my drawings. At this time we had  
15                  about 10 minutes before we had to be at the van. So  
16                  surely I went and got my drawings cause I do a lot of  
17                  art work. I turned around, was showing my drawings  
18                  to Pat and Maureen.

19                  Then that's when the victim turned  
20                  around and comes down the hallway drying her hair.  
21                  She just turned around and got out of the shower.  
22                  She was smiling. She was laughing. She come down  
23                  and says, So, Calvin, this is some of the work you  
24                  do. I say, why, you want to see it? And I'm showing  
25                  it to her the same I'm showing it to Pat and Maureen.

1                   When I went to the candlelight  
2 meeting, I don't understand why she didn't run  
3 downstairs right after the incident happened. She  
4 said she was scared of me. She wasn't scared of me  
5 at all. She would have ran downstairs if she was  
6 that scared of me. No sooner than the incident was  
7 happened she would have ran downstairs before I went  
8 to this meeting.

9                   I was at this meeting over an hour  
10 before we even got -- I got back, and the state's  
11 witness said that George Chicono drove the van,  
12 right, and drove it back, come back -- I mean that  
13 he's the one that drove the van, come and picked us  
14 up, and took it back. He ain't the one. Lee is the  
15 one that drove the van, came and picked us up from  
16 the candlelight meeting.

17                  When I asked Lee in the van what  
18 happened, right, he says, oh, Janice turned around  
19 and freaked out again. That's how we all knew that  
20 Janice turned around and freaked out.

21                  When we went in, we was wondering what  
22 was going on with Janice. I had no clue of ever  
23 anything that she went and told them that I turned  
24 around and raped her when I know that I didn't rape  
25 her.

1 Q You first found out about it about 10  
2 o'clock that night?

3 A Yeah, it was about 10 o'clock, I guess,  
4 yeah, after the meeting.

5 Q And you're saying that this took place  
6 about seven?

7 A Yeah, all this stuff is suppose to take  
8 place around 7 o'clock. In the trial they said 6:30  
9 to 7 o'clock, but it wasn't. It happened between  
10 6:45 to 7 o'clock cause we had to be in the van at 5  
11 after 7. So there ain't no way -- the way they  
12 talked in the trial this had to go down at least 35,  
13 45 minutes, and there ain't no way, ain't no way.

14 Q Now, are you saying that this is what you  
15 would have testified to?

16 A Yes, I would have testified to this.

17 Q But you were not given that opportunity?

18 A Yeah, I didn't have the opportunity to do  
19 this, that this victim was lying, right.

20 Q Had you indicated to Mr. MacVeigh that  
21 this is what you wanted the -- had you told Mr.  
22 MacVeigh that this is what you wanted -- this is the  
23 story you wanted to tell?

24 A Yeah, and he told me that it would -- it  
25 probably would hurt me.

1 Q Okay. These are all the matters that you  
2 complained of?

3 A Yeah.

4 MR. ARCURI: Okay. No further  
5 questions.

6 MR. KELLEY: Cross-examination, Your  
7 Honor?

8 \* \* \*

9 CROSS-EXAMINATION

10 BY MR. KELLEY:

11 Q Mr. Roth, you met Mr. MacVeigh how long  
12 after you were arrested, a month you said?

13 A I guess it's about a month. I don't  
14 really actually don't know. It was a month after or  
15 might have been a little longer, but I think it was  
16 about a month.

17 Q Where did you meet him?

18 A At the York County Prison. No, the first  
19 time met him was at the magistrate's office the day I  
20 turned around I came in for the hearing.

21 Q Okay. And was it at that time that you  
22 told him that consent would be your defense at trial?

23 A Yes, yes, I did.

24 Q Your preliminary hearing was March 24th,  
25 1993. Do you recall meeting with Attorney MacVeigh

1 at any time prior to that perhaps at the York County  
2 Prison in January?

3 A You're talking -- what hearing are you  
4 talking about?

5 Q I'm talking about the preliminary hearing?

6 A Magistrate's hearing?

7 Q Yeah, that was in March. Do you recall  
8 meeting with Attorney MacVeigh possibly at the York  
9 County Prison in January?

10 A No, I don't.

11 Q Okay. And you met him two times after  
12 that preliminary hearing as well prior to trial?

13 A The only times that I remember meeting him  
14 was at the magistrate's office and one time at the  
15 Adams County Prison -- I mean at the York County  
16 Prison, and at that time it wasn't a very good  
17 meeting at the time any way. Me and him -- I mean he  
18 was mad. I got mad. He got mad. So I mean we  
19 really didn't get that much to say to each other.

20 Q Okay. But the first time you met him was?

21 A At the magistrate's office.

22 Q At least you recall at the magistrate's  
23 hearing at the time you discussed consent being a  
24 defense?

25 A Yes, I did.

1 Q And how long had that been since you had  
2 seen the victim in this case. You met --

3 A I didn't see the victim till that day.  
4 That was from May 25th to that day.

5 Q Let me rephrase my question then. Okay.  
6 So you say May 25th to March --

7 A May 25th was the last time I seen the  
8 victim. The second time I ever seen the victim was  
9 the day of that magistrate's office.

10 Q Okay.

11 A At the magistrate's hearing that was the  
12 last time.

13 Q So it had been, what, about 10 months?

14 A No, I mean I was only -- yeah, I guess it  
15 would have been about that. Let's see. Let's see.  
16 May 25th. I was caught July 10th, and they came and  
17 got me. Yeah, it's been about 10 months.

18 Q Okay. And you say your -- the look of you  
19 had changed substantially, and you don't think that  
20 the victim could have identified you?

21 A No, I don't because I mean I was real,  
22 real dark. At the time I wasn't dark. I had blond  
23 hair, reddish blond hair, and I had red beard, almost  
24 a whole full grown red beard. So how could the  
25 victim see me. And I was even wearing glasses like I

1 am right now.

2 Q Okay. How much time did you spend at the  
3 Colonial House with the victim? Said you were pretty  
4 close?

5 A I had 12 days to go before I turned around  
6 and ended that program.

7 Q Okay. But that's not the question.

8 A The victim -- they said, okay, in the  
9 trial she said that she was only there three weeks.

10 Q Okay. That's not my question. The  
11 question is, How much time did you spend at the  
12 Colonial house with the victim?

13 A Out of the time that I was there I'd say  
14 after two weeks after she was there that she wasn't  
15 doing what she was suppose to do, acting crazy, a  
16 little crazy, I think after that after I started  
17 talking to her I know at least two weeks, two weeks,  
18 three weeks cause we was pretty close, started  
19 getting pretty close. I was the only one that could  
20 talk to her.

21 Q So you spent three weeks with her pretty  
22 much every day you saw her?

23 A Every day we seen each other. We had to  
24 cause we lived in the same place.

25 Q Okay. And you think after 10 months she

1 wouldn't have been able to identify you at the  
2 magistrate's hearing had it not been for as you say  
3 me pointing you out?

4 A No, I don't think she could have because  
5 let me -- okay, let me put it this way. If the  
6 victim could actually know who I was when they had me  
7 in the magistrate's office and David MacVeigh was  
8 there, she walked right past me and didn't know who I  
9 was. So I know darn well, excuse me, that she  
10 couldn't have identified me cause she looked right at  
11 me.

12 Q When you asked Attorney MacVeigh to file a  
13 motion for a lineup, that was obviously after the  
14 preliminary hearing at the magistrate's office,  
15 right?

16 A No, that was before the magistrate's  
17 hearing. I asked him that the day that I met him at  
18 the magistrate's office. I told him I'd like to have  
19 a lie detector test and turn around and have a  
20 lineup.

21 Q So you met --

22 A And he said it wouldn't help me out any.  
23 He said this ain't -- how did he say that. Oh,  
24 this -- we are not here because you killed somebody.  
25 We are here because they say that you raped somebody.



1           Q       Did you ask him for the lineup before the  
2 magistrate's hearing or after the magistrate's  
3 hearing?

4           A       Before.

5           Q       Where before, outside?

6           A       Outside the magistrates when he first came  
7 and talked to me.

8           Q       Okay. And when you went inside, that's  
9 when the victim -- or I pointed you out to the  
10 victim, is that right?

11          A       You turned and said, This is Calvin W.  
12 Roth, Jr., and then you turned and looked at the  
13 victim. The victim looked at me and turned and  
14 around and moved to the crisis lady, and she put her  
15 arms around her, and she said, yes, shook her head.  
16 You -- excuse me. You don't forget things like that  
17 especially when you're being accused of something  
18 that ain't true.

19          Q       Okay. Now, at that point the victim had  
20 seen you?

21          A       Yes.

22          Q       And had been identified presumably by me  
23 as the person who had had consensual sex with her?

24          A       You asked if that was me. You asked if  
25 this was Calvin -- I mean Calvin Roth. You didn't

1 say W. Roth. You said this is Calvin Roth. She  
2 turned, looked at the lady, looked at me, and then  
3 looked at you, shook her head, and said, yes.

4 Q At that point the victim had already seen  
5 you in your, as you say, changed state with your  
6 different colored hair and suntan?

7 A Yeah.

8 Q Wouldn't a lineup have just given her  
9 another chance to take a look at you?

10 A No, a lineup would have showed to see that  
11 if she still remembered me, to see if she could  
12 remember me.

13 Q Okay. The three witnesses who Attorney  
14 MacVeigh had failed to call were Maureen McPartland,  
15 is that her name?

16 A I think that's how you say it. I don't  
17 have her address here.

18 Q Walter Gladstone?

19 A Yeah.

20 Q And Christian whomever, right?

21 A Yeah, I don't know. He was a client.

22 Q You don't know his last name?

23 A I don't remember his last name. I looked  
24 for it. I don't have it.

25 Q Did you provide Attorney MacVeigh with

1 Christian's address?

2 A I told him that he was a client at the  
3 Colonial House, and David MacVeigh did ask Mr.  
4 Lipscomb about that. Mr. Lipscomb said he would not  
5 give up confidential files of the names and addresses  
6 of these people.

7 Q And this Maureen McPartland are you aware  
8 whether Mr. MacVeigh had contacted her at all?

9 A Yes, I am.

10 Q He had contacted her, and did he subpoena  
11 her as well?

12 A Yeah.

13 Q As far as you are aware?

14 A Yes, as far as I am aware of he did.

15 Q She didn't show up?

16 A She didn't. He said there was a paper  
17 that he got from her or from her attorney if I  
18 remember right. I only seen the paper the time when  
19 he came out to the A.C.P. I don't remember -- I mean  
20 Y.C.P. I don't remember what he said.

21 \* \* \*

22 (Whereupon, Commonwealth's Exhibit No.  
23 1 was produced and marked for identification.)

24 \* \* \*

25 BY MR. KELLEY:

1           Q       Mr. Roth, I'll show you what I've had  
2 marked as Commonwealth Exhibit 1 and ask you to take  
3 a look at that and ask you whether that's that piece  
4 of paper you were referring to earlier that you said  
5 you had seen once?

6           A       Yeah, it's the same one.

7           Q       That's the piece of paper, and the  
8 signature on the bottom of that piece of paper is by  
9 whom, Maureen?

10          A       Maureen.

11          Q       And the date up on the right hand?

12          A       It says July 14th.

13          Q       Of 1993?

14          A       Yes.

15          Q       And that would have been prior to your  
16 trial, is that correct?

17          A       Yes.

18          Q       And could you read the contents of that  
19 letter, please --

20          A       What part of it?

21          Q       -- to the Court. The whole letter.

22          A       7459 Thunderbird Road, Liverpool, New  
23 York, 13088. July 4th, 1993. Mr. David MacVeigh,  
24 Public Defender, York County Courthouse, 28 East  
25 Market Street, York, Pennsylvania, 17401. Dear Mr.

1 MacVeigh, as per to your questions during our July  
2 2nd, 1993 phone call -- phone conversation, excuse  
3 me, I am sending you a statement in regard to  
4 Criminal Account No. 2341 C. A. 92.

5 I met the two individuals, Calvin Roth  
6 and Janet -- I don't know how you say her last name.  
7 I don't know how you say Janet's last name.

8 Q Hlafka?

9 A Hlafka.

10 Q Approximately three weeks prior?

11 A Yeah, three weeks prior to the actual  
12 event. During the period of weekends at the Colonial  
13 House in York County Pris -- York County, York,  
14 Pennsylvania, I witnessed no activities regarding to  
15 the activities, actual rape --

16 Q I witnessed no acts relevant to the  
17 alleged rape, right?

18 A Yeah. I was merely a resident in the  
19 fac --

20 THE COURT: Excuse me, Mr. Kelley.  
21 Why don't you read it.

22 \* \* \*

23 BY MR. KELLEY:

24 Q I was merely a resident in the facility  
25 where the alleged incident occurred. I have no

1 relevant information for you. Thank you. Sincerely,  
2 Miss Maureen McPartland. That's the letter you're  
3 talking about?

4 A Yeah.

5 Q So, in fact --

6 A But my fact -- my recollection, I mean,  
7 even though the letter was sent, I still wanted her  
8 here on the stand. I have that right because I am  
9 being charged with rape. I wanted her to say her  
10 side of the story cause this is a piece of paper.  
11 Don't matter if her signature is on it or not.

12 Q In your allegations of error on the part of  
13 Attorney MacVeigh, however, you refer to written and  
14 notarized statement by a key witness for yourself,  
15 and that would be Miss Maureen McPartland, and,  
16 therefore, you're asking the Court to grant you a new  
17 trial based upon him not entering this into evidence,  
18 is that correct?

19 A Let me ask you if --

20 Q That's not the question. The question is,  
21 Isn't that correct?

22 A Yeah -- no, I'm asking for a new trial on  
23 the part that I didn't get to say my part that David  
24 MacVeigh didn't do what he was suppose to do, what I  
25 asked him to do. Everything that I asked him to do I

1 mean to him was a -- it's going to hurt me in my  
2 case. David didn't ask the victim or your witnesses  
3 what I asked him to ask him -- ask them.

4 Q Now, regarding Mr. Gladstone, Mr. MacVeigh  
5 actually contacted him and subpoenaed him, is that  
6 correct?

7 A Yes, and he was here.

8 Q And he testified at your trial?

9 A Yes.

10 Q Furthermore, he also introduced a  
11 photograph that depicted yourself and the victim in  
12 this case hugging, is that correct?

13 A Right.

14 Q So you have no problem with what he did  
15 relative to Mr. Gladstone, do you?

16 A No, cause he was here.

17 Q Okay.

18 A The problem about the witnesses that I  
19 wanted him to do was find out from Marvin Lipscomb if  
20 he could get the address and phone number of  
21 Christian.

22 Q Of Christian?

23 A Because there was something that was said  
24 in a group meeting that Christian turned around and  
25 said that Maureen said to me over the phone that I

1 wanted to hear in trial.

2 Q The real problem you had was just  
3 regarding Christian, is that what you're saying now?

4 A Yeah, and Maureen not being here to say  
5 her part.

6 Q Okay. And as to the doctor, you wished  
7 the victim to have an examination by a doctor?

8 A Yeah, cause she was raped. Wouldn't -- if  
9 she was raped, she should have that, right, to prove  
10 the fact that she had any bruise or forced entry,  
11 anything on her.

12 Q There was no testimony at all regarding  
13 any bruises on the victim's body, do you recall that?

14 A No, there wasn't.

15 Q And you also recall that the victim  
16 testified that she submitted to you based upon your  
17 threats to her, do you remember that?

18 A That's what she says, but that's not true.

19 Q Therefore, a doctor wouldn't be able to  
20 testify to any bruises or absence of any bruises  
21 because the victim had testified that, in fact, she  
22 wasn't injured at all?

23 A You're incorrect. If the victim turned  
24 around and said that I -- if the victim turned around  
25 and says that I rape her, right, and I weigh 245



1 what he's saying.

2 DEFENDANT ROTH: Your Honor, I believe  
3 what I say.

4 THE COURT: I know.

5 DEFENDANT ROTH: When it's in black  
6 and white.

7 THE COURT: Even whether it's true or  
8 not, you believe what you're saying at this moment.  
9 I'll buy that.

10 DEFENDANT ROTH: Yes, I do.

11 \* \* \*

12 BY MR. KELLEY:

13 Q Mr. Roth, just a couple more questions  
14 regarding your testimony at trial. You, in fact,  
15 took the stand and testified at trial and  
16 indicated --

17 A Yes, I did.

18 Q -- that this was consensual sex, right?

19 A Yes, I did.

20 Q You testified that she helped you get out  
21 of her room, and she even acted as a lookout, right?

22 A Yes, she did.

23 Q And you said all this at trial, didn't  
24 you?

25 A Yes, I did.

1 Q What was it in addition to what you said  
2 at trial that Mr. MacVeigh did not let you say?

3 A The actual story from the beginning to the  
4 end that if you -- if you remember, cause you got to  
5 remember cause you got it in front of you, he only  
6 asked actually I mean like two or three questions  
7 about the actual incident and the rape. He didn't  
8 ask me exactly what actually happened from the  
9 beginning to the end.

10 Q Would it surprise you that his questions  
11 took up eight pages of testimony?

12 A No.

13 Q And your answers?

14 A Wouldn't surprise me.

15 MR. KELLEY: Okay. I have nothing  
16 further, Your Honor.

17 MR. ARCURI: I have no redirect.

18 THE COURT: You may step down.

19 MR. ARCURI: Your Honor, we rest.

20 MR. KELLEY: Your Honor, the  
21 Commonwealth calls Attorney David MacVeigh to the  
22 stand.

23 \* \* \*

24 DAVID MacVEIGH,  
25 called as a witness, having been duly sworn according

1 to law, testified as follows:

2 DIRECT EXAMINATION

3 BY MR. KELLEY:

4 Q Attorney MacVeigh, please state your full  
5 name.

6 A My name is David MacVeigh. I'm an  
7 Assistant Public Defender.

8 Q And what is your professional address,  
9 sir?

10 A Right here in the courthouse, 28 East  
11 Market Street, York.

12 Q And how long have you been employed as an  
13 assistant public defender?

14 A Since 1984, and prior to that three years  
15 in private practice.

16 Q And you've been actively practicing  
17 criminal law in the courts of York since that time,  
18 1984?

19 A Well, actually since December of 1980.

20 Q And how did you become professionally  
21 involved in the Defendant's case?

22 A I happened to be the individual who on  
23 January the 15th of 1993 was doing some interviews at  
24 the York County Prison for people who had applied for  
25 our office to represent them, and Mr. Roth was one of

1       those.

2               Q       That was prior to the preliminary hearing  
3       in Mr. Roth's case, is that correct?

4               A       Yes, sir.

5               Q       That was, what, two months prior to that  
6       time?

7               A       A little bit more than that. Mr. Roth's  
8       case had been, I believe, sent into court from the  
9       District Justice's office as a fugitive case, and we  
10      had had to file a petition to have the case remanded  
11      for a preliminary hearing, which explains that two  
12      and a half month hiatus.

13              Q       Did you discuss the substance of his case  
14      with the Defendant at that time in January, January  
15      15th, or was it just questions regarding his  
16      inability to pay for public defender?

17              A       Well, I have some notes, but they are not  
18      any really detailed notes explaining that at the time  
19      he was in the Colonial Halfway House, he was serving  
20      a sentence from Adams County Prison, and he left  
21      before the time was up. That the victim was also a  
22      resident there. I don't think that at that time at  
23      least my notes don't reflect clearly that it was a  
24      consent defense, but I'm quite certain in my mind  
25      that that's what the defense would be.

1 Q You met with the Defendant at the  
2 preliminary hearing as well?

3 A Yes.

4 Q Do you recall meeting him outside of the  
5 preliminary hearing and discussing the merits of his  
6 case or any things he wished to file on his behalf?

7 A Well, he had given me the names of the  
8 people and the addresses of the people he wanted me  
9 to try and track down for him, and those names have  
10 already been brought up in his direct testimony this  
11 afternoon.

12 Q Were those the three names he mentioned,  
13 Maureen?

14 A Maureen McPartland is clear to me, Walter  
15 Gladstone is clear to me. The third individual I  
16 can't recall his name. He says the name Christian.  
17 That might be so. I never got a last name.

18 Q Do you have within your notes any record  
19 of him requesting you to have a lineup for him?

20 A No, I don't. That might have been an oral  
21 request, but since the defense was consent as opposed  
22 to identity, I didn't see much point in having the  
23 lineup.

24 Q Describe the general overall strategy  
25 which you approached trial with, if you had any?

1           A       It was to attempt to convince the jury  
2       that because there was no physical evidence showing  
3       bruising and so forth that this was a matter of  
4       consent.

5           Q       And did you discuss approaching the trial  
6       with the Defendant from that angle?

7           A       Yes, that was his desire.

8           Q       Did you, in fact, argue that to the jury  
9       in your closing or during your case?

10          A       Yes.

11          Q       Whose idea was it to use that particular  
12       strategy of defense?

13          A       Well, I always follow my client's wishes  
14       if they are not entirely impossible, and it was a  
15       possible, feasible defense here. So it was his --  
16       that was his theory of defense from the beginning,  
17       and I was not at all dissatisfied with it.

18                   THE COURT: So, in fact, it was his  
19       theory, and you, in fact, concurred in his theory?

20                   MR. MacVEIGH: Yes.

21                               \* \* \*

22       BY MR. KELLEY:

23          Q       That it was at least theoretically a  
24       decent defense?

25          A       Correct.

1           Q       There have been a number of specific  
2       allegations where you failed to adequately represent  
3       him. I'd like to go through them at this point with  
4       you.

5           A       Okay.

6           Q       One of the first allegations in his pro se  
7       motion was that you failed to object during the  
8       outburst of the victim. Do you recall that outburst?

9           A       Yes.

10          Q       And do you recall what you did in response  
11       to the victim's outburst?

12          A       My notes --

13                   THE COURT: Excuse me. We don't need  
14       testimony to that. That matter was appealed to the  
15       Superior Court. It was specifically a matter of  
16       record. That objection was made. There was a direct  
17       appeal concerning that issue. They ruled on it.  
18       It's a closed issue.

19                               \* \* \*

20       BY MR. KELLEY:

21          Q       Also the Defendant had specifically  
22       objected to you failing to enter a notarized  
23       statement of one of the witnesses that he noted,  
24       specifically, Maureen McPartland, and that has been  
25       read. Can you tell the Court why it was you didn't

1 attempt to enter the statement of Miss McPartland?

2 A Since that's already before the Court Ms.  
3 McPartland had nothing to add one way or the other,  
4 and I couldn't see the point in attempting to, so to  
5 speak, baffle the jury with why I would put in for  
6 lack of a better word a non-statement.

7 Q Did you speak to Ms. McPartland?

8 A Yes, I did. Never in person, but over the  
9 telephone.

10 Q Did you, in fact, subpoena her and attempt  
11 to --

12 A And as a result of that subpoena she  
13 contacted me by telephone, and then sent the letter  
14 to me at my request, which is marked as Commonwealth  
15 Exhibit 1 here.

16 Q Did you release her from the subpoena  
17 after receiving that note?

18 A Yes.

19 Q What attempts did you make to track down  
20 this Christian individual?

21 A I recall speaking with one or two people  
22 at Colonial Halfway House. I could not mention names  
23 today. I don't remember who, and at a couple  
24 different places ran into the brick wall of  
25 confidentiality. Whoever I spoke to at Colonial



1 Halfway house said -- first of all, denied knowing  
2 the identity of this individual; and, second of all,  
3 said even if we knew it, we wouldn't tell you. So I  
4 was at -- there was nothing I could do.

5 Q Did you ask the Defendant for this  
6 Christian's last name or any --

7 A I can't specifically recall asking him,  
8 but I'm sure I would have.

9 Q Defendant has also objected to your  
10 failure to submit a request for a polygraph?

11 A Defense was inadmissible, served no  
12 purpose, and my understanding is that we are not  
13 entitled to that as a matter of right.

14 Q He has also objected to you didn't let him  
15 tell his story. Did you hear that when he testified  
16 to that?

17 A I did.

18 Q And why is it that you did not let him  
19 tell his story?

20 A I did let him tell his story. I think my  
21 questions on direct examination reflect that he was  
22 given the opportunity to do so and exercised that  
23 opportunity.

24 Q Was there anything that you are aware of  
25 before he took the stand which you may have told him

1 he couldn't testify to or you decided that you would  
2 not ask him?

3 A I might have asked him to attempt to  
4 maintain as calm a demeanor in front of the jury as  
5 possible. I did not think that he would come across  
6 terribly well in front of jury, and, therefore, I  
7 asked him to be as natural and cool and calm as  
8 possible, but I don't think that I limited his  
9 testimony. I think, in fact, the record would show  
10 that my questions to him were fairly open ended.

11 MR. KELLEY: I have nothing further at  
12 this time, Your Honor.

13 \* \* \*

14 CROSS-EXAMINATION

15 BY MR. ARCURI

16 Q Mr. MacVeigh, there -- I may have missed  
17 this when I was writing down notes. When did you  
18 first meet with him?

19 A My notes reflect January the 15th of that  
20 year. Now, I did not write '93 on our application  
21 form. I might have the year wrong. I notice we have  
22 a blank application form, has date of application  
23 which the client fills in, and that's marked as  
24 12/31/9 -- it's hard to see if that's a '92 or a '93.  
25 So if I said '93, I don't know what year, but then I

1 wrote my name beside it and then 1/15. So it would  
2 have been January 15th of some year. Suppose that's  
3 probably '93.

4 Q Okay. Do you recall that or are you  
5 just --

6 A No, I don't recall it.

7 Q You're not reconstructing this from your  
8 notes?

9 A Yeah.

10 Q You don't -- would you say Mr. Roth's  
11 testimony is accurate in that he asked you for a  
12 lineup at the preliminary?

13 A I don't recall him having asked for that.

14 Q Do you recall the incident that he just  
15 recounted wherein Mr. Kelley pointed out -- pointed  
16 out his identity to the victim?

17 A No, but I might not have been present for  
18 that. I can wonder in and out of the courtroom at  
19 the district justice's office to speak with other  
20 policeman, what have you. It's possible.

21 Q What would your reaction have been at that  
22 point if he had asked you for a lineup?

23 A That it would be the same as today. Since  
24 consent is the defense and identity is not the  
25 defense, a lineup is pointless.

1 Q Did you know at that point though that his  
2 defense was, in fact, consent?

3 A Well, my notes don't reflect it from my  
4 interview with him from several months previous to  
5 that, but lacking those written notes I still believe  
6 that that's what the defense was going to be, and I  
7 believed that at the time of the preliminary hearing.

8 Q Now, you said you did have a phone  
9 interview with the one witness, Maureen McPartland?

10 A Correct.

11 Q And do you recall what she told you about  
12 this case?

13 A One minute, please. I did make some notes  
14 of that. Would have been on July the 2nd, series of  
15 phone calls to Maureen McPartland. My notes reflect  
16 exactly as follows, quote, Knows nothing. Can't  
17 testify. Asked for a letter to that effect, and as a  
18 result of that I received this letter dated July the  
19 4th, '93.

20 Q Okay. You don't recall that, what you  
21 asked her, do you?

22 A I'm sure that it would have been  
23 open-ended questions, what if anything do you know  
24 about this, do you k

1 Q Did you know at that point though that his  
2 defense was, in fact, consent?

3 A Well, my notes don't reflect it from my  
4 interview with him from several months previous to  
5 that, but lacking those written notes I still believe  
6 that that's what the defense was going to be, and I  
7 believed that at the time of the preliminary hearing.

8 Q Now, you said you did have a phone  
9 interview with the one witness, Maureen McPartland?

10 A Correct.

11 Q And do you recall what she told you about  
12 this case?

13 A One minute, please. I did make some notes  
14 of that. Would have been on July the 2nd, series of  
15 phone calls to Maureen McPartland. My notes reflect  
16 exactly as follows, quote, Knows nothing. Can't  
17 testify. Asked for a letter to that effect, and as a  
18 result of that I received this letter dated July the  
19 4th, '93.

20 Q Okay. You don't recall that, what you  
21 asked her, do you?

22 A I'm sure that it would have been  
23 open-ended questions, what if anything do you know  
24 about this, do you know these people, but, no, I  
25 don't recall specifically.

1 Q And you released her from the subpoena?

2 A I would think that I did. I probably did.  
3 It sounds like something I would have done once I  
4 knew that she was not going to be able to help.

5 Q Do you know how the subpoena was served on  
6 her?

7 A Certified mail. I think I got the receipt  
8 for that.

9 THE COURT: In New York?

10 MR. MacVEIGH: Yeah.

11 THE COURT: Is that a valid service?

12 MR. MacVEIGH: She responded.

13 \* \* \*

14 BY MR. KELLEY:

15 Q Did you communicate with her counsel?

16 A I don't --

17 Q I think that was represented here at some  
18 point. I just want a clarification on that.

19 A I think that Mr. Roth had said that I had  
20 received a letter from either her or her attorney,  
21 referring to Exhibit 1. I don't believe that she had  
22 an attorney, Your Honor, although I don't see the  
23 return for the subpoena. I recognize my secretary's  
24 handwriting on a receipt for it.

25 Q Let me ask you this once more without

1 belaboring it. You don't recall the questions you  
2 asked her surrounding this incident?

3 A Not specifically.

4 Q I believe Mr. Roth's testimony is that she  
5 possibly could have testified to the fact that they  
6 were friends before and had begun to establish at  
7 least some kind of relationship prior to this?

8 A They being?

9 Q They being Mr. Roth and the victim.

10 A She just basically said she didn't know  
11 anything, and she sounded -- she sounded dangerous to  
12 me, dangerous as far as a defense witness.

13 Q Dangerous that she might testify against  
14 you?

15 A She could end up on the stand and turn  
16 into a hostile witness. She was clearly not very  
17 happy at having, for example, me contact her at her  
18 place of employment, that sort of thing.

19 Q Okay. Now, the other one named Christian,  
20 you came up with road blocks in terms of  
21 confidentiality?

22 A Yes.

23 Q Do you know whether or not you could have  
24 possibly gotten a Court order to produce that person?

25 A I suppose I probably could have. My

1 impression was that Christian would have said much  
2 the same thing, and since Mr. Gladstone had provided  
3 the photograph showing my client's arm around the  
4 victim, that that substantiated pretty thoroughly  
5 what Mr. Roth was maintaining.

6 Q Okay. Do you have anything in your notes  
7 or do you recall why Christian would have been a  
8 relevant witness?

9 A No. Irrelevant?

10 Q No, a relevant, not irrelevant?

11 A No, sir.

12 Q You already answered the question about  
13 the polygraph. Do you recall Mr. Roth telling you  
14 that the relevance of the witness named Christian was  
15 that at a group meeting Janet made the statement that  
16 she had set him up?

17 A I can't say that I recall that. This  
18 would have been -- I guess my question would be how  
19 would Mr. Roth know that since he absented himself  
20 posthaste.

21 DEFENDANT ROTH: Am I allowed to  
22 answer that?

23 THE COURT: Yes, but not right now.  
24 You get another turn.

25

\* \* \*



1 BY MR. KELLEY:

2 Q Mr. MacVeigh, when you prepared Mr. Roth  
3 for trial, did you know at that point prior to trial  
4 whether or not he was going to testify?

5 A Well, as a theoretical matter, it seemed  
6 to me a virtual certainty that he'd have to to get  
7 the defense of consent in front of the jury since the  
8 victim was clearly going to claim that force was used  
9 or threatened.

10 Q Okay. Did you go over his testimony with  
11 him?

12 A Not in great detail, no. I do not like  
13 the jurors to receive the -- or obtain the impression  
14 that the testimony has been well planned out and well  
15 smoothly delivered to them. If there are some bumps  
16 in the road, that's okay with me.

17 Q And did you give Mr. Roth the ability to  
18 tell all of his story?

19 A The record would have to speak for itself.  
20 I don't recall exactly the questions I asked.

21 Q Did you caution him not to say certain  
22 things?

23 A Yes, I did. If you want me to go into  
24 that, I'm sure you don't, but if you want me to, I'll  
25 be happy to.

1 Q I think you might as well.

2 A Mr. Roth's attitude was extremely hostile  
3 at every turn, and during -- just in speaking about  
4 the victim to me, he was seething, referred to her as  
5 that fuckin' cunt bitch, that kind of -- that  
6 constantly, and that was basically how he was going  
7 to -- it struck me that he was prepared to take the  
8 stand, and with her here in the courtroom having  
9 broken down before the jury somewhat before to still  
10 refer to her as a cunt bitch, I knew that was not  
11 going to endear him to the jury, and I cautioned him  
12 about that excessively perhaps.

13 Q So you told him to modify his language?

14 A Correct.

15 Q Okay. Did you caution him as to any parts  
16 of his story that he should stay away from if he was  
17 simply given the opportunity to kind of ramble on?

18 A No, I don't think so. I wanted the jury  
19 to have an alternate explanation for the reason that  
20 he left the halfway house.

21 Q Mr. MacVeigh, do you have any recollection  
22 of what the physical evidence was in this case?

23 A If memory serves, there was little or  
24 none. The Commonwealth's theory was that, first of  
25 all, there were no other witnesses besides the

1 complaining witness; and, second, that no physical  
2 harm was visited upon the victim, rather that she was  
3 threatened with it.

4 Q Did you inquire of the victim perhaps  
5 whether he was a much larger person than she was or  
6 was that readily obvious to the jury?

7 A I think that today is the first I've heard  
8 that at the time Mr. Roth weighed 85 pounds more than  
9 he did at the time of the trial, and I don't frankly  
10 remember what the photograph depicts.

11 Q There was no physical evidence introduced  
12 then, clothing, torn clothing?

13 A Record speaks for itself. I think he's  
14 probably right about that.

15 MR. ARCURI: I have no other  
16 questions, Judge.

17 THE COURT: You may step down. I  
18 believe there was something additional Mr. Roth  
19 wanted to explain. He can stay wherever he is and  
20 tell us.

21 \* \* \*

22 CALVIN ROTH, JR.,  
23 called as a witness, having been duly sworn according  
24 to law, testified as follows in rebuttal:

25 DIRECT EXAMINATION

1 BY MR. ARCURI:

2 Q Mr. Roth, the question as related to Mr.  
3 MacVeigh related to the witness Christian and asked  
4 him whether or not you had informed him of what you  
5 felt Christian was going to testify to.

6 A And he said he he wanted to know how I  
7 knew that Christian --

8 Q Let me ask you, first of all, was the  
9 statement that I asked -- the question that I asked  
10 Mr. MacVeigh substantially correct that Christian  
11 would have testified -- in your opinion Christian  
12 would have testified to a meeting that was held where  
13 the victim admitted to setting you up, is that  
14 correct?

15 A Yes.

16 Q How did you know of Mr. -- or Christian?

17 A From calling Christian.

18 Q You called him?

19 A Yeah, I called him. I said I had his  
20 address. I said that on the stand if I remember. I  
21 had his address and his last name, but I don't know  
22 what I did. I went through my notes. I don't have  
23 it. I don't know what happened to it, but I did have  
24 his address and his phone number cause he gave it to  
25 me when I was at Colonial House. We had a little

1 address book. It stated that everybody gives their  
2 names and phone numbers to each other.

3 Q You're saying you gave that to Mr.  
4 MacVeigh at the time prior to the trial?

5 A Yeah, I told him I wanted him to see if he  
6 could get a hold of him, but at the time I didn't  
7 have his address and phone number at the time because  
8 I didn't have my address book, but they had my  
9 address book in Indiana. My wife had it cause I was  
10 married at the time, and I couldn't get it, could not  
11 get it from her.

12 Q When did you get his name and address,  
13 before or after trial?

14 A I got his name when I was at the Colonial  
15 House.

16 Q And when you were arrested, you then had  
17 contact with him?

18 A Yeah, I talked to him before I was  
19 arrested when I left Colonial House, and I turned  
20 around and called Maureen and called him, talked to  
21 them both. Maureen -- I mean Christian is the one  
22 that told me that they had a group meeting and said  
23 that they got on Janice because in the group meeting  
24 at the Colonial House you're suppose to bring your  
25 fears out and your feelings on what the matter

1 happened.

2 So she said she was raped there. So  
3 they was trying to get her to bring her feelings out  
4 and get them out in the open so they could talk about  
5 them and get them over with. They said they did  
6 that. Christian stated to me over the phone that  
7 when they did that, Janet said that they actually --  
8 she set me up. So I was trying to get Christian in  
9 here so he could testify to that.

10 And I tried to get the victim -- the  
11 counselor that works at Colonial House because she  
12 was the counselor at the time at this meeting. If  
13 anybody would know the truth, she would know the  
14 truth that she said that. I do not know if that is  
15 the truth or not. I would like to know if it is.

16 Q Do you know Vicki's last name?

17 A No, I do not. I just know she was the  
18 counselor. I did know.

19 Q Is that Vicki Bailey?

20 A She was the counselor. I don't know. I  
21 couldn't tell you. I just know she was the counselor  
22 out there at the Colonial House at the time that I  
23 was there.

24 Q Okay. But go back to Christian. What I  
25 wanted you to state on the record here is whether or

1 not you gave that name and address or place to  
2 contact him to Mr. MacVeigh?

3 A No, I didn't give him no name. I gave him  
4 the name, but I didn't give him the address. I told  
5 him he could probably get it from Marvin Lipscomb.

6 Q Okay. So his statement then is accurate  
7 that he probably contacted them, and he had  
8 confidentiality problems?

9 A Yeah, he probably did say that.

10 MR. ARCURI: That's all.

11 \* \* \*

12 CROSS-EXAMINATION

13 BY MR. KELLEY:

14 Q How about Vicki? Did you give Vicki's  
15 name to Dave?

16 A Yes, I did.

17 Q How come this is the first time you ever  
18 mentioned that?

19 A What do you mean the first time I ever  
20 mentioned that?

21 Q You never mentioned it on the stand or in  
22 your petitions about this Vicki?

23 A Well, Vicki is the counselor. I mean she  
24 wouldn't be able to testify against me either way.  
25 If she did, she would put the whole rehab up in

1 danger at the time. So --

2 THE COURT: You're absolutely right  
3 about that.

4 DEFENDANT ROTH: I do not want to hurt  
5 her.

6 THE COURT: Not a matter of hurting  
7 her. She's got privileged communication.

8 DEFENDANT ROTH: That's what I'm  
9 saying. I don't want to hurt her. That's why I  
10 didn't bring it up.

11 \* \* \*

12 BY MR. KELLEY:

13 Q Did you ever give the name to Dave  
14 MacVeigh though?

15 A Yeah, I did mention it to him, yeah. I  
16 said they was in the group together, that was his  
17 counselor, but see I couldn't get a hold of Vicki  
18 because I wanted to talk to Vicki about this. Vicki  
19 turned around and already left the rehab. She quit.  
20 She quit her job and went to another job. So I  
21 couldn't get her. I tried to get her name -- I mean  
22 her whole name or address, everything. I couldn't  
23 get it.

24 THE COURT: Okay. Mr. Arcuri, after  
- 25 hearing the testimony, I'm satisfied that there is no



1       need to take additional testimony because based on  
2       what the Defendant has said about these prospective  
3       witnesses, I think I am in a position to be able to  
4       rule on the matter.

5                       As to the Defendant's complaints about  
6       Mr. MacVeigh, I will try to take them in order. The  
7       first one was the failure to object when the victim  
8       broke down and acted hysterical.

9                       We find that there, in fact, was an  
10      objection made by Mr. MacVeigh at the time, that the  
11      Defendant pursued that matter on direct appeal to the  
12      Superior Court, that was the main issue that was  
13      raised, and there was an opinion written by the  
14      Superior Court rejecting that matter. Therefore, Mr.  
15      MacVeigh did everything possible he could do in  
16      regard to that matter, and he can't be ineffective  
17      for having failed to do matters which he, in fact,  
18      did.

19                      As to a lineup, there would be no  
20      purpose in having a lineup when the defense is  
21      consent. The fact that the victim did not possibly  
22      recognize the Defendant some 10 months later at the  
23      time of the preliminary hearing when the Defendant's  
24      appearance had changed markedly would be of no  
25      significance, and the fact that the Defendant took

1 the stand and admitted his participation in the  
2 sexual act means that a failure to have a lineup  
3 would be of no legal significance.

4 The failure to have a polygraph is  
5 also of no legal significance because the polygraph  
6 is deemed unreliable by the courts, and had a  
7 polygraph been taken, it would not have been  
8 admissible into evidence.

9 The fact that Mr. MacVeigh failed to  
10 obtain a doctor or obtain medical reports is of no  
11 significance because the victim acknowledged at trial  
12 that she had no bruises. Therefore, the doctor would  
13 have merely confirmed that which the victim herself  
14 admitted.

15 As to Mr. MacVeigh's arguing the fact  
16 that no bruises exist, the record is clear that he,  
17 in fact, did make that argument. In fact, it was the  
18 main focus of the defense, and this is confirmed by  
19 the transcript of the trial itself.

20 The fact that the Defendant was not  
21 given the opportunity to tell his story his way is  
22 not a matter of ineffective assistance of counsel.  
23 Clearly the Defendant had the opportunity to tell his  
24 story. This was done in the form of questions and  
25 the answers to the questions rather than simply

1 telling the Defendant to go ahead and tell his story  
2 and letting him ramble on in a fashion that would not  
3 necessarily be presented coherently as it would be  
4 when proper questions are asked and answered, and, in  
5 fact, if the Defendant had attempted to just tell his  
6 own story without questions being presented, the  
7 Commonwealth would have had the right to object and  
8 require that the questions be asked and answers be  
9 made to specific questions.

10 So, therefore, what the Defendant  
11 wanted to do would have been legally objectionable  
12 and the Commonwealth and/or the Court would have had  
13 the right to require that counsel ask questions and  
14 the Defendant respond to those questions.

15 Therefore, as to all of those matters,  
16 the Defendant has not raised any objections that  
17 might possibly even remotely be considered  
18 ineffective assistance of counsel.

19 The Court next turns to the  
20 allegations involving the failure to have three  
21 witnesses present for trial. The Court would note,  
22 first, that Attorney MacVeigh acknowledges being  
23 requested to have those three witnesses available  
24 and, in fact, did contact two of the three witnesses  
25 and, in fact, had one of them present.

1                   So as to Mr. Gladstone, the Court can  
2 not see how Mr. MacVeigh could have been ineffective  
3 since he, in fact, did contact him, he did subpoena  
4 him, he did have him here in trial, and he did give  
5 the testimony that the Defendant wanted. What more  
6 the counsel could have done, I cannot imagine.

7                   As to Miss McPartland, this defense  
8 counsel acknowledges being requested to have her as a  
9 witness, that he contacted her, that she informed him  
10 that she had no personal knowledge of the events  
11 which occurred specifically, and that she did not  
12 wish to be a participant, and in response to that he  
13 elected not to call her as a witness.

14                  Counsel had the foresight to have this  
15 put in writing by the potential witness so that he  
16 had documented written proof that this was the case.  
17 If the witness had been called to testify and had  
18 given the same statement that she gave in her letter  
19 to Mr. MacVeigh, there would have been nothing that  
20 she could have added to the trial. Therefore, his  
21 failure to call her could hardly be deemed to be  
22 ineffective.

23                  We also note that the subpoena that  
24 was issued to a witness who was residing in the state  
25 of New York was not properly served and could not

1 have been enforced in any event. So his so-called  
2 decision to release her from the subpoena was of no  
3 significance, the subpoena never having been properly  
4 legally served in the first place.

5 We do note that the Defendant does  
6 have a proper objection in one sense in that what he  
7 wanted Miss McPartland to testify about was the  
8 Defendant's relationship with the victim in the weeks  
9 prior to the alleged rape rather than about what  
10 happened at the time of the actual rape.

11 The Defendant acknowledges that  
12 McPartland was not present when the sexual act  
13 occurred and obviously could not have given any  
14 testimony about that, and it is not clear to the  
15 Court that Mr. MacVeigh did ask Miss McPartland about  
16 the matters relating to the relation between the  
17 parties in the three weeks prior to the alleged rape.

18 On the other hand, that testimony if  
19 it had existed, would have been merely cumulative  
20 given the testimony of Mr. Gladstone, and the fact  
21 that he had photographic evidence showing the victim  
22 with her arm around the Defendant and given that old  
23 adage that a picture is worth a thousand words, we  
24 feel that the testimony that the jury did hear was  
25 sufficient to show the existence of a prior

1 relationship between the two of them, and that the  
2 testimony of McPartland would have not offered  
3 anything beyond that, and to that extent would have  
4 been cumulative even if, in fact, it did actually  
5 exist.

6 As to the witness who was known as  
7 Chris or Christian, the Court finds that the  
8 statement that he was to testify to would have been a  
9 statement given by the victim in the course of  
10 counseling, that the statement she gave in the course  
11 of counseling to her counselor as part of her  
12 therapeutic counseling session albeit a group session  
13 would have been privileged, and could not have been  
14 disclosed either by the counselor or anybody else who  
15 participated in those sessions.

16 Further, we find that there was  
17 nothing further that Mr. MacVeigh could have done  
18 other than the steps he took, which were to attempt  
19 to find out who the person was, and having failed to  
20 do so, there was no further steps he could have  
21 taken.

22 Had he applied to the Court for a  
23 Court order requesting that those confidential  
24 records would have been disclosed, he would not have  
25 been entitled to such an order. Therefore, his

1 failure to make that request is of no legal  
2 significance.

3 Further, we find that the Defendant  
4 himself did not provide a suitable method to contact  
5 Christian, and that he himself had that available.  
6 He acknowledges that he himself had Christian's  
7 address and phone number, and that he failed to  
8 provide it to counsel. So he can hardly blame  
9 counsel when counsel was not able to obtain that  
10 which, in fact, he admits he had and failed to  
11 provide to counsel.

12 Therefore, we find that counsel was  
13 not ineffective in failing to have those three  
14 witnesses present as claimed in his testimony.

15 Finding that the Defendant has offered  
16 no valid reasons why he would be entitled to  
17 post-conviction relief, his petition is denied.

18 \* \* \*

19 (END OF PROCEEDINGS)

20 \* \* \*

21

22


23

24

25

C E R T I F I C A T I O N

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the hearing in the above cause, and that this copy is a correct transcript of the same.

  
Debra S. Romesberg,  
Official Court Reporter

The foregoing record of the proceedings upon the hearing of the above cause is hereby approved and directed to be filed.

---

John H. Chronister,  
Judge





B  
H



# Supreme Court of Pennsylvania Middle District

JOAN L. STEHULAK, ESQUIRE  
DEPUTY PROTHONOTARY

SHIRLEY BAILEY  
CHIEF CLERK

434 MAIN CAPITOL BUILDING  
P.O. BOX 624  
HARRISBURG, PENNSYLVANIA 17108  
(717) 787-6181

May 30, 1997

Frank C. Arcuri, Esquire

COMMONWEALTH OF PENNSYLVANIA

RESPONDENT

V.

CALVIN WILLIAM ROTH, JR.

PETITIONER

No. 0775 M.D. Allocatur Docket 1996

Counsel:

is is to advise you that the attached order has been entered on the Petition for  
nce of Appeal filed in the above-captioned matter.

Very truly yours,  
Office of the Prothonotary  
Supreme Court of Pennsylvania

1  
on. John H. Chronister, J.  
ork; 2341 CA 1992; Criminal  
on Kelly, Esquire

IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	: No. 775 M.D. Alloc. Dkt. 1996
	:
Respondent	: Petition for Allowance of
	: Appeal from Order of the
	: Superior Court
v.	:
	:
ALVIN WILLIAM ROTH, JR.,	:
	:
Petitioner	:

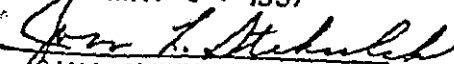
ORDER

PER CURIAM

AND NOW, this 29th day of May, 1997, the Petition for allowance of Appeal is denied.

TRUE & CORRECT COPY

ATTEST: MAY 30 1997

  
JOAN L. STEHULAK, ESQUIRE  
DEPUTY PROTHONOTARY



07/27/01 10:54 FAX 215 871 8477

NATIONAL ARCHIVES - PHIL

**1: CV 97-1773**RECEIVED  
SCRANTON

NOV 17 1997

AO 241 (Rev. 5/83)

PETITION UNDER 18 USC § 2254 FOR WRIT OF  
HABEAS CORPUS BY A PERSON IN STATE CUSTODY

<b>United States District Court</b>		District Middle	FILED NOV 17 1997
Name Calvin William Roth, Jr.	Prisoner No. CY-1623	Case No. 2341 CA 1992	
Place of Confinement S.C.I. Houtzdale, PA 16698, Box 1000			
Name of Petitioner (include name under which convicted) Calvin William Roth Jr.		Name of Respondent (authorized person in custody of petitioner) v. John M. McCullough (superintendent)	
The Attorney General of the State of Pennsylvania		NOV 17 1997	
		PER	DEPUTY CLERK
<b>PETITION</b>			
1. Name and location of court which entered the judgment of conviction under attack <u>Court of Common</u> <u>pleas, York County, Pennsylvania</u>			
2. Date of judgment of conviction <u>July 21, 1993</u>			
3. Length of sentence <u>11 years to 22 years</u>			
4. Nature of offense involved (all counts) <u>Escape, Rape, and terroristic Threats.</u>			
5. What was your plea? (Check one)			
(a) Not guilty <input checked="" type="checkbox"/>			
(b) Guilty <input type="checkbox"/>			
(c) Nolo contendere <input type="checkbox"/>			
If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: <u>Plead guilty to escape- went to jury trial on Rape and</u> <u>Terroristic Threats.</u>			
6. If you pleaded not guilty, what kind of trial did you have? (Check one)			
(a) Jury <input checked="" type="checkbox"/>			
(b) Judge only <input type="checkbox"/>			
7. Did you testify at the trial? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>			
8. Did you appeal from the judgment of conviction? Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>			

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003/004

AO 241 (Rev. 5/85)

## 9. If you did appeal, answer the following:

- (a) Name of court Superior Court
- (b) Result Remanded for P.C.R.A. Hearing
- (c) Date of result and citation, if known 11-5-93
- (d) Grounds raised \_\_\_\_\_

## (e) If you sought further review of the decision on appeal by a higher state court, please answer the following:

- (1) Name of court Common pleas York County, PA
- (2) Result P.C.R.A. denied
- (3) Date of result and citation, if known 1-30-96
- (4) Grounds raised Ineffective counsel

## (f) If you filed a petition for certiorari in the United States Supreme Court, please answer the following with respect to each direct appeal:

- (1) Name of court \_\_\_\_\_
- (2) Result \_\_\_\_\_
- (3) Date of result and citation, if known \_\_\_\_\_
- (4) Grounds raised \_\_\_\_\_

## 10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal?

Yes ☒ No ☐

## 11. If your answer to 10 was "yes," give the following information:

- (a) (1) Name of court Common pleas Court York County, PA
- (2) Nature of proceeding P.C.R.A.
- (3) Grounds raised Ineffective counsel

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NATIONAL ARCHIVES - PHL

AO 241 (Rev. 5/83)

- (4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes ☒ No ☐

(5) Result P.C.R.A. Denied

(6) Date of result 1-30-96

- (b) As to any second petition, application or motion give the same information:

(1) Name of court Superior Court

(2) Nature of proceeding Appeal P.C.R.A.

(3) Grounds raised Ineffective Counsel

- (4) Did you receive an evidentiary hearing on your petition, application or motion?  
Yes ☐ No ☒

(5) Result Lower Court Affirmed

(6) Date of result 1-31-96

- (c) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes ☒ No ☐

(2) Second petition, etc. Yes ☒ No ☐

- (d) If you did not appeal from the adverse action on any petition, application or motion, explain briefly why you did not:

Appealed Superior Court ruling to the Supreme court- Supreme court denied on allowance of appeal on 5-29-97

- (2. State concisely every ground on which you claim that you are being held unlawfully. Summarize briefly the facts supporting each ground. If necessary, you may attach pages stating additional grounds and facts supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your available state court remedies as to each ground on which you request action by the federal court. If you fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

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002/00

AO 241 (Rev. 5/95)

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, you should raise in this petition all available grounds (relating to this conviction) on which you base your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of these grounds.

- (a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.
- (b) Conviction obtained by use of coerced confession.
- (c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search and seizure.
- (d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.
- (e) Conviction obtained by a violation of the privilege against self-incrimination.
- (f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.
- (g) Conviction obtained by a violation of the protection against double jeopardy.
- (h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impaneled.
- (i) Denial of effective assistance of counsel.
- (j) Denial of right of appeal.

A. Ground one: (I) Ineffective counsel

Supporting FACTS (state briefly without citing cases or law) 1) Failure of counsel to object when victim broke down & acted hysterical at trial.

2) Failure of trial counsel to have a line up after appellant notified counsel before hearing. 3) Failure of counsel to procedure a polygraph test. 4) Failure to obtain doctor or medical reports. 5) Failure to no physical evidence existed.  
6) Failure to allow appellant to relate his story at trial.  
7) Failure to call three witnesses at trial.

B. Ground two:

(H) Jury was unconstitutionally selected and impaneled.

Supporting FACTS (state briefly without citing cases or law):

There were ten women and two men on my jury, which I feel prejudiced against me in a trial of Rape.



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AO 241 (Rev. 5/85)

C. Ground three: Failure to have compulsory process for obtaining  
witness in defendants favor.

Supporting FACTS (state briefly without citing cases or law):

(3) three witnesses were not called on behalf of the defendant  
in this case- All testimony against an accused person must be  
presented publicly in court.

D. Ground four

Supporting FACTS (state briefly without citing cases or law):

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state briefly what grounds were not so presented, and give your reasons for not presenting them:

(H) Jury was unconstitutionally selected and impaneled- unlettered  
at the law and ineffective counsel before and at trial.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack?  
 Yes ☐ No ☒

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing J. David MacVeigh- Public defender

(b) At arraignment and plea J. David MacVeigh- Public defender

(d)

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001/004

AO 241 (Rev. 5/83)

(c) At trial J. David MacVeigh- Public defender(d) At sentencing J. David MacVeigh- Public defender

(e) On appeal \_\_\_\_\_

(f) In any post-conviction proceeding Frank C. Arcuri EsquireP.O. Box 429 York, PA 17405(g) On appeal from any adverse ruling in a post-conviction proceeding Frank C. Arcuri EsquireP.O. Box 429 York, PA 17405

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?

Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack?

Yes ☐ No ☒

(a) If so, give name and location of court which imposed sentence to be served in the future: \_\_\_\_\_

(b) Give date and length of the above sentence: \_\_\_\_\_

(c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future?

Yes ☐ No ☐

Wherefore, petitioner prays that the Court grant petitioner relief to which he may be entitled in this proceeding.

\_\_\_\_\_  
Signature of Attorney (if any)

I declare under penalty of perjury that the foregoing is true and correct. Executed on

11-12-97

(date)

  
Signature of Petitioner

(7)



IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CALVIN WILLIAM ROTH,  
Petitioner

v.

JOHN M. McCULLOUGH, et al.,  
Respondents

: CIVIL ACTION NO. 1:CV-97-1773

:  
:  
:  
:  
:  
:  
:  
:

(Chief Judge Rambo)


FILED  
HARRISBURG Pa  
JUL 17 1998

MARY E. D'AMOREA, CLERK  
Per MED  
Deputy Clerk

O R D E R

In accordance with the accompanying memorandum, IT IS HEREBY  
ORDERED THAT:

1. The petition for writ of habeas corpus is dismissed, without prejudice, for failure to fully exhaust state remedies.
2. The Clerk of Court is directed to close the case.
3. Based on the court's conclusion herein, there is no basis for the issuance of a certificate of appealability.

  
SYLVIA H. RAMBO, Chief Judge  
Middle District of Pennsylvania

Dated: July 17, 1998.

SR:jvw

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CALVIN WILLIAM ROTH,	:	CIVIL ACTION NO. 1:CV-97-1773
	:	
Petitioner	:	
	:	
v.	:	
	:	
JOHN M. McCULLOUGH, <u>et al.</u> ,	:	(Chief Judge Rambo)
	:	
Respondents	:	

FILED  
HARRISBURG PA

JUL 17 1998

M E M O R A N D U M

Background

MARY E. DAVENPORT, CLERK  
Per [Signature]  
Deputy Clerk

Calvin William Roth Jr., an inmate presently confined at the State Correctional Institution, Houtzdale, Pennsylvania (SCI-Houtzdale), initiated this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was previously granted leave to proceed in forma pauperis. Named as Respondents are SCI-Houtzdale Superintendent John M. McCullough and the Attorney General of Pennsylvania.

Roth states that he was convicted of rape and terroristic threats following a jury trial in the York County, Pennsylvania Court of Common Pleas. He also entered a plea of guilty to a charge of escape. Petitioner was thereafter sentenced to an eleven (11) to twenty-two (22) year term of confinement. His petition initially asserts that he received ineffective assistance from his trial counsel. Specifically, he maintains that his trial attorney failed to: request a line up; obtain medical reports;

call three witnesses; object when the victim broke down and acted hysterically during trial; have petitioner undergo a polygraph test; permit petitioner to testify in his own behalf; and did not note the absence of physical evidence. Roth's second alleged basis for relief is that his jury was unconstitutionally selected and impaneled. He states that his jury was prejudicial because it consisted of ten (10) women and two (2) men. His final claim asserts "failure to have compulsory process for obtaining witness in defendants (sic) favor". (Doc. 1, ¶ 12(c) of rec.) Petitioner is apparently alleging that the failure to have three (3) witnesses testify on his behalf also violated his constitutional rights.

Respondents have filed a response arguing that the petition should be dismissed because it includes claims that have not been exhausted in state court. Although granted an opportunity to do so, petitioner has not submitted a reply. Consequently, this matter is now ripe for consideration.

As a general rule, a state prisoner must exhaust available state court remedies before seeking habeas relief in federal court. See 28 U.S.C. §§ 2254(b), (c); Rose v. Lundy, 455 U.S. 509, 515-20 (1982). "Unless it would be patently futile to do so, [a state prisoner] must seek relief in state court before filing a federal habeas petition . . . ." Santana v. Fenton, 685 F.2d 71,

77 (3d Cir. 1982).<sup>1</sup> The exhaustion requirement "is not a mere formality. It serves the interests of comity between the federal and state systems by allowing the state an initial opportunity to determine and correct any violations of a prisoner's federal rights." Gibson v. Scheidemantel, 805 F.2d 135, 138 (3d Cir. 1986).

A habeas corpus petitioner bears the burden of demonstrating that he has satisfied the exhaustion requirement. See Gonce v. Redman, 780 F.2d 333, 336 (3d Cir. 1985). Exhaustion is not complete unless the trial court, a state intermediate appellate court (if applicable), and the highest state court, here the Supreme Court of Pennsylvania, have been presented with the substance of petitioner's claims. See Evans v. Court of Common Pleas, 959 F.2d 1227, 1230 (3d Cir. 1992). The threshold inquiry in the exhaustion analysis is whether the claims asserted in the habeas corpus petition have been "fairly presented" to the state court. Picard v. Connor, 404 U.S. 270, 275 (1971). In Duncan v. Henry, 513 U.S. 364, 366 (1995), which concerned exhaustion of an evidentiary issue, the Supreme Court relied, inter alia, on Picard and held: "If a habeas petitioner wishes to claim that an

---

1. Exceptions to the exhaustion requirement are made when: (1) the state corrective process is so deficient as to render any effort to obtain relief futile, 28 U.S.C. § 2254(b); (2) acts of state officials have, in effect, made state remedies unavailable to the petitioner, Mayberry v. Petsock, 821 F.2d 179, 184 (3d Cir. 1987); or (3) "inordinate delay" in state proceedings has rendered state remedies ineffective. Story v. Kindt, 26 F.3d 402, 405 (3d Cir. 1994).

evidentiary ruling at a state court trial denied him the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in federal court, but in state court."

One of the avenues for relief in the Pennsylvania legal system is collateral relief under the Post Conviction Relief Act (P.C.R.A.). 42 Pa. Cons. Stat. Ann. §§ 9541-46 (West Supp. 1997). "P.C.R.A. permits motions for post-conviction collateral relief for allegations of error, including ineffective assistance of counsel, unlawfully induced guilty pleas, improper obstruction of rights to appeal by Commonwealth officials, and violation of constitutional provisions." Hankins v. Fulcomer, 941 F.2d 246, 251 (3d Cir. 1991).<sup>2</sup>

This court recognizes that the exhaustion requirement is not jurisdictional and nonexhaustion is not "an absolute bar to consideration of the merits of a habeas corpus [petition] . . . ." Granberry v. Greer, 481 U.S. 129, 131 (1987). The Supreme Court in Granberry favored an "intermediate approach" whereby the appellate courts may "exercise discretion in each case to decide whether the administration of justice would be better served by insisting on exhaustion or by reaching the merits of the petition

---

2. To exhaust one's claims, they may be presented to the state courts directly on appeal from the judgment of conviction and sentence or through a collateral proceeding under the P.C.R.A. It is not necessary, however, to present federal claims to state courts both on direct appeal and in a P.C.R.A. proceeding. Evans, 959 F.2d at 1230; Swanger v. Zimmerman, 750 F.2d 291, 295 (3d Cir. 1984).



forthwith." Id. Similarly, our Court of Appeals in Evans has stated that the district courts reviewing habeas petitions may deny plainly meritless claims which have not been exhausted. 959 F.2d at 1231.

The Antiterrorism and Effective Death Penalty Act of 1996 (the "AEDPA") was signed into law on April 24, 1996. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. §§ 2244 and 2254). Section 2254(b), as amended by the AEDPA, provides as follows:

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that --

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the state, through counsel, expressly waives the requirement.

The AEDPA modified the exhaustion requirement in two respects. First, it provides that a state must expressly waive the exhaustion requirement; mere failure to raise the issue is not a waiver. Additionally, the AEDPA adopted the Evans rule which

permits a court to deny a habeas petition on the merits even if a prisoner failed to exhaust all of his state court remedies and even if the state had not explicitly waived the exhaustion requirement. Thus, "if a question exists as to whether the petitioner has stated a colorable federal claim, the district court may not consider the merits of the claim if the petitioner has failed to exhaust state remedies and none of the exceptions set forth in Sections 2254(b)(1)(B)(i) and (ii) applies." Lambert v. Blackwell, 134 F.3d 506, 515 (3d Cir. 1997) as amended (Jan. 16, 1998).

A review of the record provides that following his conviction, Roth filed a direct appeal to Pennsylvania's Superior Court, which solely asserted that the trial court abused its discretion by denying trial counsel's request for a mistrial following a display of emotion by the victim during her testimony. By order dated December 14, 1995, the Superior Court affirmed the judgment of sentence. An allowance of appeal to Pennsylvania's Supreme Court was denied by order dated May 29, 1997.

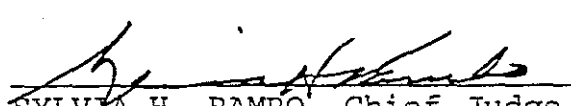
Petitioner then sought collateral relief via a P.C.R.A. petition. His petition asserted the same allegations of ineffective assistance of counsel which are raised herein. Following a hearing, the trial court denied the P.C.R.A. petition by order dated January 30, 1996. However, there is no indication that petitioner's remaining jury-related allegations were raised in that proceeding. Roth appealed the denial of his P.C.R.A.

petition to both Pennsylvania's Superior and Supreme Courts and his instant petition indicates that said appeals were also unsuccessful.

Roth acknowledges that he did not previously raise his allegation of an unconstitutionally selected and impaneled jury in state court. See Doc. 1, ¶ 13 of rec. Consequently, it is undisputed that Roth's instant petition contains at least one unexhausted claim. Pursuant to 28 U.S.C. § 2254(b), this court, if appropriate, could exercise discretion to hear and deny any plainly meritless unexhausted claims. However, since no Pennsylvania state appellate court has been afforded the opportunity to review Roth's jury related allegations, this court declines to exercise its discretion because the administration of justice would be better served by insisting on complete exhaustion. See Duarte v. Hershberger, 947 F. Supp. 146, 149-50 (D.N.J. 1996).

Habeas petitions containing unexhausted claims are normally dismissed so that the petitioner can exhaust his state remedies. See Peoples v. Fulcomer, 882 F.2d 828, 832 (3d Cir. 1989). Prior to dismissing his petition as premature, this court must determine if it would be futile for Roth to file another P.C.R.A. petition. See Doctor v. Walters, 96 F. 3d 675, 681 (3d Cir. 1996). In light of Roth's assertion that his failure to previously attack the constitutionality of his jury was due to ineffective assistance of counsel and the failure of any state

court to hold that said claim is procedurally barred, it cannot be concluded at this juncture that it would be futile for Roth to assert his unexhausted claim in state court. See Toulson v. Beyer, 987 F. 2d 984, 987 (3d Cir. 1993). For the foregoing reasons, the petition will be dismissed, without prejudice, for failure of petitioner to fully exhaust his state remedies. An appropriate order will be issued.

  
SYLVIA H. RAMBO, Chief Judge  
Middle District of Pennsylvania

Dated: July /7 , 1998.

SR:jvw



2-198

# MOTION FOR POST CONVICTION COLLATERAL RELIEF

7-89

COMMONWEALTH OF PENNSYLVANIA

VS

Calvin William Roth JR.  
(Name of Defendant)

COURT AND DOCKET NUMBERS

To be filled in by Clerk of Court

NOTE: List below those informations or indictments & offenses for which you have not completed your sentence.

INFORMATION OR INDICTMENT NUMBERS:

No. 2341 CA 1992

I WAS CHARGED WITH THE FOLLOWING CRIMES:

Escape, Rape, Terroristic Threats

1. MY NAME IS:

Calvin William Roth Jr.

2. I AM NOW

(A) ☐ On Parole (B) ☐ On Probation (C) ☒ Confined in S.C.I. Houtzdale

3.

I WAS SENTENCED ON September, 2, 19 93 TO A TOTAL TERM OF 11-to-22 years, COMMENCING ON December 30, 19 92 BY JUDGE(S) John H. Chronister

FOLLOWING A:

☒ Trial by jury

☐ Plea of guilty

☐ Trial by a judge without a jury

☐ Plea of nolo contendere

4. I AM ELIGIBLE FOR RELIEF BECAUSE OF:

☒

(I) A violation of the constitution of Pennsylvania or laws of this Commonwealth or the constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

☒

(II) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

☐

(III) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.

☐

(IV) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.

☒

(V) A violation of the provisions of the constitution, law or treaties of the United States which would require the granting of federal habeas corpus relief to a state prisoner.

☐

(VI) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

☐

(VII) The imposition of a sentence greater than the lawful maximum.

☐

(VIII) A proceeding in a tribunal without jurisdiction.

5. THE FACTS IN SUPPORT OF THE ALLEGED ERROR(S) UPON WHICH THIS MOTION IS BASED ARE AS FOLLOWS: (State facts clearly and fully; argument, citations, or discussions of authorities shall not be included.)

(A) I know the following facts to be true of my own personal knowledge:

Ineffective assistance of Counsel; Failure to call at trial, expert witness as to the extent, or non-existence of bruises, abrasions or other signs of a forced sexual assault. Violation of the (14th) Amendment, due process, in which trial counsel allowed an unconstitutionally selected and impaneled prejudice jury consisting of (10-woman and two men), photographs, taken by staff, at rehab center, should have been entered as evidence for the defence.

(2). Inconsistent statements; Marvin Lipscomb erred in trial testimony, inconsistent with statement to police.

(3). Inappropriate comments; (DA) in closing refers to the Defendants state of mind.

(B) The following facts were made known to me by means other than my own personal knowledge (Explain how and by whom you are informed):

(C) In the event my appeal is allowed as requested under #4, the following are the matters which I intend to assert on that appeal (Specify the matters to be asserted if appeal is allowed)

(1) Ineffective Assistance of Counsel.

(2) Violation of the Constitution of the United States and/or constitution of Pennsylvania.

(3) Inconsistent Statements of State Witness.

(4) Inappropriate comments by the (DA) in closing.



## 6. SUPPORTING EXHIBITS

(A) In support of this motion I have attached as exhibits:

☒ Affidavits ☒ [Exhibit(s) No. B-1-B-2]

☒ Records [Exhibit(s) No. A-1-A-9 D-1-D-3]

☒ Other Supporting Evidence [Exhibit(s) No. C-1]

(B) I have not attached any affidavits, records or other supporting evidence because

## 7. I HAVE TAKEN THE FOLLOWING ACTION(S) TO SECURE RELIEF FROM MY CONVICTION(S) OR SENTENCE(S):

(A) Direct Appeal (IF "YES," name the court(s) to which appeal(s) was/were taken, date, term and number, and result.)

☒ YES ☐ NO

Superior court, 11-5-93, HBG93, 00711, Remanded for P.C.R.A.

hearing 12-14-95, Judgment Affirmed.

Superior Court, 11-25-96, HBG96, 158, Judgment Affirmed.

Supreme Court, Middle District, 5-29-97, No. 775 M.D. 1996 Appeal Denied.

(B) Previous proceedings in the courts of the Commonwealth of Pennsylvania

☒ YES ☐ NO

(IF "YES," name the type of proceedings (such as habeas corpus, etc.) — including former proceedings under the Post Conviction Hearing Act the Court(s) in which petition(s) was/were filed, date, term and number, and result, including all appeals.)

P.C.R.A. Hearing, relief denied. 1-30-96

(C) Habeas Corpus or other petitions in Federal Courts

☒ YES ☐ NO

(IF "YES," name the district in which petition(s) was/were filed, date(s), Court Number—civil action or miscellaneous, and result, including all appeals.)

Middle District of PA filed on July-17-1998 1:CV-97-1773

Civil Action. Resulted in the petition being dismissed without prejudice.

(D) Other legal proceedings

☐ YES ☐ NO

(IF "YES," give complete details—type of action, court in which filed, date, term and number, and result, including all appeals.)

8. FOLLOWING MY ARREST, I WAS REPRESENTED BY THE FOLLOWING LAWYER(S): (Give the lawyer's name and the proceeding at which he represented you.)

J. David Macveige, Trial Attorney

Frank R. Arcuri, Esquire, P.C.R.A. Hearing, all Appeals

9. THE ISSUES WHICH I HAVE RAISED IN THIS MOTION HAVE NOT BEEN PREVIOUSLY LITIGATED AND ONE OF THE FOLLOWING APPLIES:

- ☒ (I) The allegation of error has not been waived.
- ☒ (II) If the allegation of error has been waived, the alleged error has resulted in the conviction or affirmance of sentence of an innocent individual."
- ☐ "(III) If the allegation of error has been waived, the waiver of the allegation of error during pretrial, trial, post-trial or direct appeal proceedings does not constitute a state procedural default barring federal habeas corpus relief."

The failure to litigate this issue(s) prior to or during trial or on direct appeal could not have been the result of any rational strategic or tactical decision by counsel.

10. BECAUSE OF THE FOREGOING REASONS, THE RELIEF WHICH I DESIRE IS:

- (A) ☒ Release from custody and discharge
- (B) ☒ A new trial
- (C) ☒ Correction of sentence
- (D) ☐ Other relief (specify): \_\_\_\_\_

11. (A) I am ☐ ABLE ☒ NOT ABLE to pay the costs of this proceeding.

I have \$ \_\_\_\_\_ in my prison account.

(B) My other financial resources are: NONE

12. (A) ☒ I do not have a lawyer and I am without financial resources or otherwise unable to obtain a lawyer

(1) ☒ I request the court to appoint a lawyer to represent me.

(2) ☐ I do not want a lawyer to represent me.

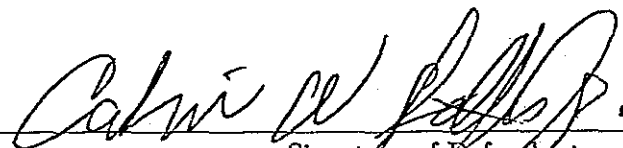
(B) ☐ I am represented by a lawyer. (Give name and address of your lawyer.)

  
(Signature of Defendant)

### UNSWORN DECLARATION

Calvin William Roth Jr. do hereby verify that  
Your Name

the facts set forth in the above motion are true and correct  
to the best of my personal knowledge or information and  
belief, and that any false statements herein are made sub-  
ject to the penalties of Section 4904 of the Crimes Code  
(18 Pa. C.S. § 4904), relating to unsworn falsification to  
authorities.

  
Signature of Defendant

No Notary  
Required

COMMONWEALTH OF PENNSYLVANIA

VS

IN THE CRIMINAL COURTS OF THE COUNTY OF \_\_\_\_\_

(Name of Defendant)

Criminal

Action No. \_\_\_\_\_ of \_\_\_\_\_ 19 \_\_\_\_\_

## ORDER

AND NOW this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ Upon consideration of the foregoing motion

1. ☐ The motion is returned to defendant for amendment as follows, such amendment to be made on or before \_\_\_\_\_, 19\_\_\_\_

2. ☐ A rule is granted upon the Commonwealth of Pennsylvania to show cause why a hearing should not be granted. The rule is returnable on or before \_\_\_\_\_ 19\_\_\_\_

3. ☐ The request to proceed as a poor person, without the payment of costs, is ☐ granted ☐ denied.

4. ☐ Upon finding that defendant is unable to obtain a lawyer \_\_\_\_\_ Esq., is appointed to represent him.

5. ☐ The Clerk of this Court is ordered and directed to do the following forthwith:

(a) To serve a copy of this motion and this order upon the District Attorney of \_\_\_\_\_ County.

(b) To send a copy of this motion and this order to \_\_\_\_\_ Esq., the lawyer for the defendant.

(c) To send a copy of this order to the defendant.

6. ☐



## Commonwealth of Pennsylvania

COUNTY OF YorkSS: **SEARCH WARRANT**  
AND AFFIDAVIT

Det. Jeffrey S. Snell

(Name of Affiant)

West Manchester Twp. Police

(Police Department or address of private Affiant)

792-9514

(Phone No.)

WARRANT CONTROL

D 26087

DATE OF APPLICATION

INVENTORY NO.

G 20913

being duly sworn (or affirmed) before me according to law, deposes and says that there is probable cause to believe that certain property is evidence of or the fruit of a crime or is contraband or is unlawfully possessed or is otherwise subject to seizure, and is located at particular premises or in the possession of particular person as described below.

## IDENTIFY ITEMS TO BE SEARCHED FOR AND SEIZED (be as specific as possible):

Human blood from one Calvin W. Roth Jr., D.O.B. 7-2-63, who is a current inmate at York County Prison. Also a human saliva sample from Calvin W. Roth Jr.

## SPECIFIC DESCRIPTION OF PREMISES AND/OR PERSONS TO BE SEARCHED (Street and No., Apt. No., Vehicle, Safe Deposit Box, etc.):

Calvin W. Roth Jr., D.O.B. 7-2-63, white male, 6', approx. 172 lbs., brown hair, and brown eyes, who is a current inmate at York County Prison

## NAME OF OWNER, OCCUPANT OR POSSESSOR OF SAID PREMISES TO BE SEARCHED (If proper name is unknown, give alias and/or description):

Calvin W. Roth Jr. / Richard Hahn (Warden of York County Prison)

## VIOLATION OF (Describe conduct or specify statute):

Pa. Crimes code, Sec. 3121, Rape

DATE OF VIOLATION

5-25-92

## PROBABLE CAUSE BELIEF IS BASED ON THE FOLLOWING FACTS AND CIRCUMSTANCES:

On 5-25-92 Janet M. Velte, a resident of Colonial Halfway House, 3600 W. Market St., York, Pa., reported that she was raped on 5-25-92 by another resident of Colonial Halfway house. She stated that the resident who committed this rape against her was Calvin W. Roth Jr. Janet related this information to another resident and staff personnel at Colonial Halfway House within an hour of the rape. She was then immediately transported to York Hospital for an examination. At York Hospital Dr. Joe Caldwell performed an examination on Janet Velte. A wet mount of her vaginal discharge revealed non-motile sperm. Additional vaginal swabs and smears were taken along with her clothing for future lab examinations into this matter.

Marvin T. Lipscomb who is the Executive Director of the Colonial Halfway House stated that he confronted Calvin at approximately 2200 hrs. on 5-25-92 in regards to the fact that a female resident was claiming that she was raped by him. Mr. Lipscomb stated that he told Calvin to remain in the recreation room and not to move. He stated that he further told Calvin that Janet was going to the hospital for an examination. Mr. Lipscomb stated that he left the recreation room for approximately one minute, and

ATTACH ADDITIONAL PAPER (5) COPIES IF NECESSARY ☒ CHECK HERE IF ADDITIONAL PAPER IS USED.

RESULT OF SEARCH  GIVE BRIEF NARRATIVE OF WHAT HAPPENED	DATE AND TIME OF SEARCH 4/2/93; 10:04		<input checked="" type="checkbox"/> A.M. <input type="checkbox"/> P.M.	ARREST <input type="checkbox"/> YES <input checked="" type="checkbox"/> NO	JUDGE'S DISPOSITION <input type="checkbox"/> DISC. <input type="checkbox"/> HELD FOR COURT <input type="checkbox"/> FURTHER HEARING <input type="checkbox"/> FINED OR COMMITTED
	PROPERTY SEIZED (If "yes" list inventory on separate form, R2008 and enter control number(s) here <u>G 20913</u> ) <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO				
	SIGNATURE OF PERSON SEIZING PROPERTY <u>Jeffrey S. Snell</u>		BADGE NO. <u>10</u>	OTHER OFFICERS PARTICIPATING IN SEARCH:	

Signature of Affiant 2501 Catherine St., York, Pa. 10 West Manchester  
Address of Private Affiant Badge No. District/Unit

Sworn to and subscribed before me this 2ND day of APRIL 19 93. Office



IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

No. 2341 Criminal Action 1992

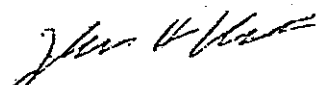
vs

CALVIN WILLIAM ROTH, JR.

ORDER

Defendant has filed a second Petition for post conviction relief. The conviction in this matter has been final for a period in excess of one year. Therefore no further appeals or post conviction proceedings would be possible. Defendant's Petition is refused.

-BY THE COURT,

  
JOHN H. CHRONISTER  
JUDGE





IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA

VS.

CASE NO. 2341 C.A. 1992

CALVIN WILLIAM ROTH, JR.

NOTICE OF MOTION TO SET ASIDE SENTENCE AS STATED ABOVE

PLEASE TAKE NOTICE THAT upon the annexed affidavit of Calvin William Roth, Jr., sworn to this 18 day of FEB, 1999, and Any supporting information and or documents attached hereto, and Upon the accusatory instrument and all other papers filed herein, The defendant will move this court, at the Courthouse located at York County, York, PA. 17401, for a date of April 1999, or as soon Thereafter as counsel may be heard for:

(1) An order, pursuant to criminal procedure Law, of state governing sections, and united states Code §2255, R. Crim. P. 35(b)(1) and All additions as the defendant is proceeding PRO-SE. setting aside The sentence heretofore imposed upon the above named defendant on The 21st day of July, 1993, or in the alternative, order a hearing To determine whether such sentence should be set aside on the ground That:

The defendant asserts that the present sentence is [invalid], the Defendant was not properly informed or represented by counsel, nor Was he allowed to challenge this sentence due to contradicted Testimony which is in violation of Rule 108.3 [SEE: Com VS. Riley 326 A.2d 384, 466 pa. 339/Comm VS. Mosteller 284 A.2d 786, 446 pa. 339/.Comm VS. Coleman 264 A.2d 649, 438 pa. 373. the defendant has Additional information that will be available for hearing in this Matter, along with additional arguments.

The defendant informed counsel of the unconstitutionally selected And impaneled Jury. the defendant being prejudiced by out burst if The Jury was given proper instructions after said out-burst. counsel Failure to raise this argument on appeal as was my request counsel

Failure to communicate with me. Counsel is not amicus curiae but Has an duty to perform reasonable care and duty/. and violations Of the defendant's rights guaranteed him under the United States Constitution. (how the trial should have been handled), 391 F.2d 971

(2) If counsel failed to establish in-Camira hearing and the probative need for the same. trial counsel deficient performance has Prejudiced the defendant resulting in an unreliable and unfair Outcome of these proceedings SEE Lockhart VS. Fretwell, 506 U.S. \_\_\_, 122 Led 2d 180; 113 S.ct 838 (1993).

(3) If the jury had been tainted due to the outburst during trial The defendant being denied the right to a cross section of his Peers, there were Ten(10) woman and two(2) men on my jury(prejudicing The defendant and the out-come of his trial).NOTE:(on trial of Rape Of a woman complainant).

(4) Fact that the defendant objects to Juror who stated "she had a friend who experienced this" counsel failed to challenge this Juror as was my wish (paremptory).

(5) Failure of counsel to secure witnesses that would have changed The out-come of the trial. witnesses that could have testified to Fact concerning this case. and there being probative value in the Calling of said witnesses.

(6) Defendant being prejudiced due to tainted and contradicted Testimony as made by commonwealths witnesses, that is contradicted From police reports and preliminary trial.

(7) Fact that the defendant contacted counsel with instructions Of his wishes how-ever counsel fail to honor thoughts wishes.also Through various family members attempted to contact counsel Regarding this matter to no avail,SEE ¶ Media Corp VS. Murphy & P Allison, 773 F Supp 1047.

(8) The defendant seeks all discovery in this matter(which transcript and discovery go hand in hand in order to argue any appealable issue's)SEE: Comm VS. Lawson 549 A2d 107.

(9) The united States District Court having established that certain Arguments in this matter have not been exhausted,please SEE; ¶ Exhibit attached marked(A) and incorporated by reference.

(10) The above arguments are a violation of the defendant's rights guaranteed him under the United States Constitution. this is an ongoing matter that needs to be heard. all of the arguments as set forth above in the new matter are appealable. immediate and final disposition of this matter is essential because;

The defendant is incarcerated and continues to suffer financial loss; The deprivation of gainful employment; severe anxiety within his family life; deprivation of the opportunity to gather evidence, contact witnesses, or to otherwise prepare his defense.

(11) The defendant request an order pursuant to this NOTICE TO SET ASIDE SENTENCE, to produce the defendant at any hearing conducted to determine this motion; and

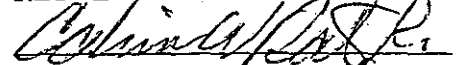
(12) Such other and further relief as this honorable court may deem just and proper. (in the alternative the defendant would be prohibited from exhausting state remedies in this matter please SEE: Mayberry VS. Petsock 821 F.2d 179,184 (3rd Circ 1987).

PLEASE TAKE FURTHER NOTICE that answering affidavits if any, are to be served upon the undersigned at least 60 days prior to the return of this motion.

DATE: this 18 day of FEB. 1999

Executed in Houtzdale, Pennsylvania.

RESPECTFULLY SUBMITTED



CALVIN WILLIAM ROTH, JR.

Inst # CY-1623

P.O. BOX 1000

Houtzdale, PA. 16598-1000.

TO: Thomas H. Kelley/District Attorney  
District Attorneys Office  
York County Courthouse  
York, PA. 17401

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA  
CRIMINAL : DIVISION

COMMONWEALTH OF PENNSYLVANIA

VS.

CASE NO. 2341 C.A. 1992

CALVIN WILLIAM ROTH, JR.

A F F I D A V I T

Executed this day in the State of Pennsylvania, clearfield county  
Houtzdale. Being duly sworn, deposes and states under penalty of  
Perjury pa. C.S.A. sec 4904. do hereby state the following:

1. I am the defendant in the above- entitled proceeding. I make this Affidavit in support of my NOTICE OF MOTION TO SET ASIDE SENTENCE Upon the grounds that improperly impaneled jury failure of counsel To honor wishes, also failure to secure witnesses and the probative Value of said witnesses, also the sentence is invalid; based upon All arguments stated herein and in the said motion.
2. I was Convicted by Jury for Rape Terroristic Threats.
3. The defendant has been continually incarcerated since December 2nd, 1993.
4. I was sentenced to these charges by the Hon, Judge, John H. Chronist To serve 11years to 22years concurrently for a total of 22years.
5. The defendant has filed numerous motions, post convictions, and Petitions to no avail. the defendant has been proceeding PRO-SE and Has not been able to properly to present his argument as he has not Been given a complete copy of all discovery in this matter.
6. This sentence is invalid, and Illegal. the defendant at the least Should be allowed allowance of appeal. the defendant has never waived Any of his rights, nor the right to argue the new matters in this Motion or to present any evidence in this matter, or to argue case Law or any other arguments that would prove his case.
7. The grounds for relief described by this affidavit has (have)

Or Proceeding in a court of this State, except as presented herein  
Or that would be presented in any subsequent motions that may be  
Filed as a result of this action.

WHEREFORE, I the Defendant respectfully request that this honorable  
Court enter an order, pursuant to applicable state law and all the  
Information presented in this foregoing matter, setting Aside the  
Sentence imposed upon me and granting the defendant the relief that  
He seeks. ( in the alternative that this motion is accepted as a  
Collateral attack motion).

DATE: 2, 18.1999

RESPECTFULLY SUBMITTED

Calvin W. Roth, Jr.  
CALVIN WILLIAM ROTH, JR.

Inst # CY-1623

P.O. BOX 1000

Houtzdale, PA.16698-

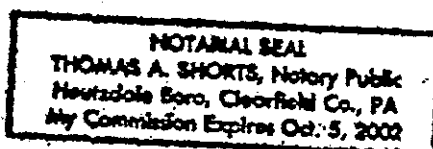
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Sworn to before me this

18th day of Feb, 1999

Thomas A. Shorts

NOTARY PUBLIC



CC: File

AFFIDAVIT OR DECLARATION  
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, CALVIN WILLIAM ROTH, JR., am the petitioner in the above-entitled case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

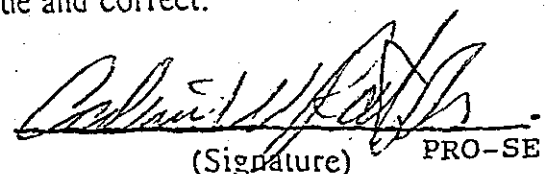
I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this Court are true.

1. Are you presently employed? Yes X No \_\_\_\_
  - a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer. SCI-Houtzdale Correctional Institution  
P.O. Box 1000  
Houtzdale, PA 16698-1000
  - b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. Menial Jail-house labor 42¢ per hour
2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes \_\_\_\_ No X
  - a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.  
N/A
3. Do you own any cash or have a checking or savings account? Yes \_\_\_\_ No X
  - a. If the answer is yes, state the total value of the items owned.  
N/A
4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing) Yes \_\_\_\_ No X
  - a. If the answer is yes, describe the property and state its approximate value.  
N/A
5. List the persons who are dependent upon you for support and state your relationship to those persons. I HAVE 0 THAT I am not able to support at this time.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: FEB 18, 1999

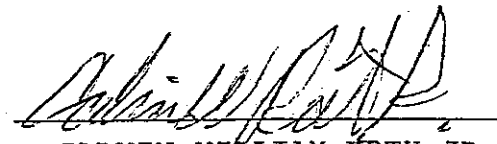
WHEREFORE, due to the above statements  
That this honorable court grant *IN FORMA*  
*PAUPERIS*, with the right to proceed, and  
The Appointment of counsel irreparable harm

  
(Signature) PRO-SE

V E R I F I C A T I O N

CALVIN WILLIAM ROTH, JR. defendant, PRO-SE, do hereby verify that the Facts set forth in this NOTICE TO VACATE JUDGEMENT/SET ASIDE IS true and correct to the best of my knowledge, information, and belief. Any false statements made herein is made subject to the penalties under 18 pa. C.S.A. section 4904 relating to unswoorn falsification to Authorities.

DATE: FEB, 18.1999

  
CALVIN WILLIAM ROTH, JR.

PROOF OF SERVICE

NAME:

SERVICE TYPE

Hon Judge, John H. Chronister  
Court of common pleas  
York, PA. 17401

Distribution

Marlyn L. Holtiapple, Clerk of Court  
York county courthouse  
York, PA, 17401

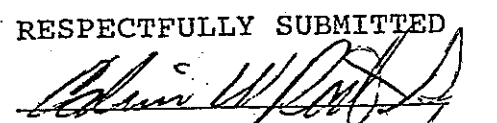
first class mail

Thomas H. Kelley, District Attorney  
York County Courthouse  
York, PA, 17401

Distribution

I, hereby certify that I am serving one oreginal and three copies upon The clerk of court of York county , for filing and Distribution NOTICE TO VACATE JUDGEMENT/SET ASIDE. THIS PROOF OF SERVICE SATISFIES The requirements under 18 pa. C.S.A. section 4904.

DATE: FEB, 18.1999

RESPECTFULLY SUBMITTED  
  
CALVIN WILLIAM ROTH, JR.





IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA  
COMMONWEALTH OF PENNSYLVANIA :No. 2341 Criminal Action 1992  
VS :  
CALVIN WILLIAM ROTH, JR. :

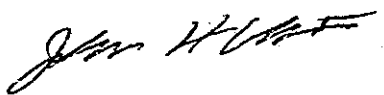
ORDER

Defendant has filed a Motion To Set Aside Sentence. This Motion is essentially a petition for post conviction relief.

Defendant had filed a Habeas Corpus in federal court. However because Roth stated he had not previously raised an allegation of an unconstitutionally selected jury in state court, the federal petition was dismissed as premature. Therefore Roth now files this Motion in state court.

This Court would note that Roth has filed two previous Post Conviction Relief Act Petitions alleging the ineffective assistance of counsel. All of the issues raised by Roth in the current Motion were either raised in his direct appeal or in the previous post convictions, or are considered waived because of the failure to raise them in the previous Post Conviction Relief Act Petitions. Therefore Roth is not entitled to state court relief and his Motion is hereby dismissed.

BY THE COURT,

  
JOHN H. CHRONISTER  
JUDGE

DATED: March 2, 1999

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

VS. :

NO. 2341 Criminal Action 1992

CALVIN WILLIAM ROTH, JR. :

NOTICE OF APPEAL

Notice is hereby given that Calvin William Roth, Jr., PRO-SE, the Defendant above named, hereby appeals to the Superior Court, of Pennsylvania from the order Entered denying Motion to set Aside Sentence and motion to Set Aside Judgement, with Collateral Attack. In this case on MARCH 2nd, 1999.

RECEIVED-FILED  
CLERK OF COURT  
YORK COUNTY  
MAR 9 22 AM '99

RESPECTFULLY SUBMITTED



CALVIN WILLIAM ROTH, JR.

Inst # CY-1623

P.O. BOX 1000

Houtzdale, PA.16698-

1000

IN THE COURT OF COMMON PLEAS OF YORK COUNTY. PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

VS. :

NO. 2341 Criminal Action 1992

CALVIN WILLIAM ROTH, JR. :

VERIFIED STATEMENT UNDER PENNSYLVANIA RULE OF APPELLATE  
PROCEDURE # 551

1. the defendant was previously granted counsel by the court after Establishing that he could not afford the appointment of counsel or The cost for said action by the lower Court.
2. There has been no substantial change in the financial condition Of the appellant since such date.
3. The appellant is unable to pay the fees and cost on appeal, nor Is he able to re-produce the original record in this matter.
4. All of these facts are true to the best of my Knowledge understa-  
nding, and belief.

RESPECTFULLY SUBMITTED



CALVIN WILLIAM ROTH, JR.

Inst # CY-1623

P.O. BOX 1000

Houtzdale, PA. 16698-

1000

DATE: MARCH, 26, 1999

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

VS. :

NO. 2341 Criminal Action 1992

CALVIN WILLIAM ROTH, JR. :

certificate of service

I, do hereby certify that I am this day serving the original and

Six copies of the attached Notice Of Appeal to the Appeals Unit for filing and distribution in the manner indicated, which Satisfies-complies with the Rules of Appellate procedure governing Service of documents to the following persons:

Hon Judge, John H. Chronister  
Court of common pleas  
York County Courthouse  
York, PA. 17401  
[first class mail]

Court Reporter/Administrator  
York County Courthouse  
York, PA. 17401  
[first class mail]

District Attorneys Office  
Thomas H. Kelley  
York County Courthouse  
York, PA. 17401  
[first class mail]

Court Stenographer  
York County Courthouse  
York, PA. 17401  
[first class mail]

NOTE: a notice of appeal having been filed in this matter pursuant To Rules of Appellant Procedure 1911-1922 the defendant do hereby Request copies of all Discovery in this matter, in conformity with Rules of appellant procedure.

DATE: MARCH, 26, 1999

  
CALVIN WILLIAM ROTH, JR. PRO-SE



J. S90030/99

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

CALVIN WILLIAM ROTH, JR.,

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 745 MDA 1999

Appeal from the Order Entered March 3, 1999,  
In the Court of Common Pleas of York County,  
Criminal Division at No. 2341 C A 1992.

BEFORE: POPOVICH, MUSMANNO and BROSKY, JJ.

MEMORANDUM:

**FILED** FEB 08 2000

This is a *pro se* appeal from the order of the Court of Common Pleas of York County on March 2, 1999, which denied without a hearing appellant's third petition for relief pursuant to the Post Conviction Relief Act. 42 Pa.C.S.A. § 9541 *et seq.* Herein, appellant raises various claims of trial counsel's and PCRA counsel's ineffectiveness. However, given the untimely nature of appellant's PCRA petition, we affirm.

Following a jury trial, appellant was convicted of rape, terroristic threats and escape, and on September 2, 1993, appellant was sentenced. Appellant filed a motion to modify sentence which was scheduled for a hearing on September 30, 1993. However, before resolution of his motion,

J. S90030/99

appellant, through counsel, filed a notice of appeal on September 24, 1993.<sup>1</sup> Despite the filing of the notice of appeal, the lower court conducted a hearing and denied appellant's motion for reconsideration of sentence on September 30, 1993.

Apparently, appellant petitioned this court to remand the matter to the lower court, and on November 5, 1993, the case was remanded. Appellant then filed a *pro se* "Motion For Judgment Of Acquittal Not Withstanding The Verdict Of A New Trial," which alleged, *inter alia*, ineffective assistance of trial counsel. On December 6, 1993, the lower court entered an order appointing new counsel and directing that appellant's *pro se* motion be considered a PCRA petition.

A hearing on appellant's PCRA petition had to be repeatedly rescheduled because appellant had been returned to the State of Indiana to serve a sentence in that state and Indiana authorities refused to release him into the custody of York County. Eventually, on December 20, 1994, this court ordered the lower court to return the record in this case to the Superior Court for resolution of appellant's direct appeal. Apparently, the original remand order from this court was intended to be a remand for the appointment of new counsel only. Consequently, the lower court forwarded the record to the Superior Court, and on December 14, 1995, in an unpublished memorandum, we affirmed appellant's judgment of sentence.

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<sup>1</sup> Appellant also filed a *pro se* notice of appeal on September 27, 1993.

J. S90030/99

**See *Commonwealth v. Roth***, 674 A.2d 319 (Pa.Super. 1996) (table). Appellant did not file a petition for allowance of appeal to our Supreme Court from our affirmance of his judgment of sentence.

Upon return of the record to York County, the lower court conducted a hearing on appellant's outstanding PCRA petition, and on January 30, 1996, the lower court denied appellant's requested relief. Appellant then appealed this decision, and on November 25, 1996, we affirmed the order which denied appellant's request for post conviction relief. On May 29, 1997, appellant's petition for allowance of appeal to our Supreme Court was denied.

Upon return of the record to York County, appellant filed his second PCRA petition on December 1, 1998. On December 9, 1998, the PCRA court denied the petition as untimely filed. **See** 42 Pa.C.S.A. § 9545. Appellant did not file an appeal from this order. However, on February 23, 1999, appellant filed a "NOTICE OF MOTION TO SET ASIDE SENTENCE AS STATED ABOVE" and a "NOTICE OF MOTION TO VACATE JUDGMENT OF TO SET ASIDE THE ABOVE [SENTENCE]." On March 2, 1999, the lower court, considering these motions as appellant's third PCRA petition, denied relief after finding that the issues raised were either previously litigated, waived or untimely filed. This appeal followed.

On November 17, 1995, the Post Conviction Relief Act was amended (effective in 60 days), and 42 Pa.C.S.A. § 9545(b)(1) now provides:



J. S90030/99

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or

(iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

Appellant filed a direct appeal from his judgment of sentence, and we affirmed on December 14, 1995. Appellant did not file a petition for allowance of appeal to our Supreme Court. Thus, appellant's judgment of sentence became final on January 13, 1996, upon expiration of the thirty-day period for filing a petition for allowance of appeal. 42 Pa.C.S.A. § 9545(b)(3); Pa.R.A.P. 1113. On February 23, 1999, appellant filed the PCRA petition now before us, his third request for relief under the PCRA.

Because of the filing date of appellant's PCRA petition *sub judice*, the PCRA, as amended on November 17, 1995 (effective in sixty days), applies. Clearly, appellant's third PCRA petition is untimely since it was filed well in excess of one year after his judgment of sentence became final on January 13, 1996. Further, our review of appellant's allegations reveals that they do

J. S90030/99

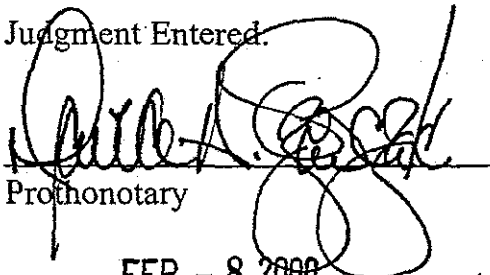
not fall within any of the exceptions to 42 Pa.C.S.A. § 9545(b)(1).

***Commonwealth v. Peterkin***, \_\_\_ Pa. \_\_\_, \_\_\_, 722 A.2d 638, 641(1998).

Accordingly, we hold that the lower court properly dismissed his petition without a hearing since appellant's third petition for post conviction relief was untimely. ***Peterkin, supra; Commonwealth v. Alcorn***, 703 A.2d 1054 (Pa.Super. 1997); 42 Pa.C.S.A. § 9545.

Order of March 2, 1999, affirmed.

Judgment Entered.

  
Prothonotary

FEB - 8 2000

Date: \_\_\_\_\_



IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, : No. 0232 M.D. Alloc. Dkt. 2000

Respondent : Petition for Allowance of Appeal from  
: Superior Court

v.

CALVIN WILLIAM ROTH, JR.,

Petitioner

ORDER

PER CURIAM

AND NOW, this 25th day of July, 2000, the petition for allowance of appeal is denied.

TRUE & CORRECT COPY

ATTEST:

JUL 25 2000  
*Shirley J. Phipps*  
SHIRLEY J. PHIPPS  
APPELLATE CLERK